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IN THE

Supreme Court of the United States

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CEDRIC D. SIMMS,

Petitioner,

v.

STATE OF OKLAHOMA, EX REL.,
THE DEPARTMENT OF MENTAL HEALTH AND
SUBSTANCE ABUSE SERVICES, A STATE AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an amendment to an EEOC charge of discrimination relate back to the date of the original charge for the purpose of complying with the statute of limitations for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, where the amendment alleges an additional "legal theory" that grows out of the same set of operative facts that were in the original charge?

PARTIES

All of the parties are listed in the caption.

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No. 98-

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OCTOBER TERM, 1998

CEDRIC D. SIMMS,

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V.

STATE OF OKLAHOMA, EX REL.,THE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES, A STATE AGENCY

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cedric D. Simms respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on January 25, 1999.

OPINIONS BELOW

The opinion of the Tenth Circuit, which is reported at 165 F.3d 1321 (10th Cir. 1999), is set out at pp. 1a-16a of the Appendix hereto. The September 3, 1997, opinion of the district court granting the respondent's motion for summary judgment, which is not reported, is set out at pp. 17a-24a of the Appendix. The decision of the court of

appeals denying rehearing and rehearing en banc, which is not reported, is set out at p. 25a of the Appendix.

JURISDICTION

The decision of the Tenth Circuit was entered on January 25, 1999. A timely petition for rehearing was denied on February 24, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTES AND REGULATIONS INVOLVED

This matter involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and its implementing regulation, 29 C.F.R. §1601.12(b), which provides, in pertinent part:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

The pertinent portions of Title VII, specifically 42 U.S.C. §§ 2000e-5 and 2000e-12(a), are printed at pp. 26a-28a of the Appendix.

STATEMENT OF THE CASE[1]

Petitioner, Cedric Simms, began his employment with the respondent at Griffin Memorial Hospital in Norman, Oklahoma as a Fire and Safety Officer I on April 29, 1991. (App. 2a). On September 11, 1991, the respondent posted a job announcement for the position of Fire and Safety Officer II. *Id.* Mr. Simms was qualified for the position and applied, but the defendant gave it to a white employee less qualified than Mr. Simms. As a result, on October 12, 1992, Mr. Simms filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that the respondent denied Mr. Simms the promotion because of his race, black. *Id.* The EEOC issued a right-to-sue letter. On December 21, 1993, Mr. Simms filed an action in federal court pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII"). *Id.*

On April 13, 1994, the parties to that case reached a settlement. Pursuant to the settlement agreement, the respondent promoted Mr. Simms to the position of Fire and Safety Officer II, effective May 1, 1994. *Id.* Also, in the settlement agreement the respondent agreed not to subject Mr. Simms to the customary six (6) month probationary period. *Id.* Respondent's employees Carol Kellison, Director of Management Support Services, and Stand LaBoon, Superintendent, were provided with a copy of the agreement and were aware that the agreement required the probationary period be waived. Nevertheless, Kellison and LaBoon withheld Mr. Simms' supervisory duties until June 20, 1994. *Id.*

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[1]Although this case has its origins in a complicated history of litigation, this petition includes only those facts that are relevant to the issue before the court.

On June 30, 1994, ten days after Mr. Simms began his supervisory duties, the respondent posted a job announcement for the position of Fire and Safety Officer Supervisor. *Id.* The job announcement stated that "PREFERENCE WILL BE GIVEN TO APPLICANTS WITH SUPERVISORY EXPERIENCE." *Id.* Mr. Simms applied, interviewed for the position, and received the highest scores from a panel of six interviewers. Instead of promoting Mr. Simms, Kellison initiated a second round of interviews and selected the three member panel, which consisted of Kellison, La Boon, and Ed Smith, an African American. The respondent ultimately gave the position to Bruce Valley, a white employee. At the time that Mr. Valley was promoted he was being supervised by Mr. Simms. *Id.* Nevertheless, respondent contended that Mr. Valley was given the promotion because he had more supervisory experience than Mr. Simms.

Unassisted by counsel, Mr. Simms filed a second EEOC charge on October 31, 1994. (App. 2a). Mr. Simms checked the box indicating he believed that he was discriminated against because of his race. (The charge is reproduced in the Appendix following App. 29a). In the area asking for the particulars of his claim, Mr. Simms stated that his claims arose from the denial of his promotion to the position of Fire and Safety Officer Supervisor.[2]

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[2]Specifically, the charge stated:

I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe I have been discriminated against because of my race, Black, in violation of Title VII of the

On July 15, 1996, Mr. Simms, now having obtained the assistance of counsel, filed an amendment to his October 31, 1994 EEOC charge. (App. 3a). Mr. Simms added retaliation as a legal claim and explained why he believed respondent's decision not to promote him was motivated by racial discrimination and retaliation for his previous lawsuit. (See following App. 31a). He also alleged additional acts related to the promotion denial he believed were unlawful employment practices.[3]

Civil Rights Act of 1964, as amended.

[3]Specifically, the amendment stated:

> I. Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held [*sic*] from my Fire and Safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.
>
> II. The reasons given for withholding of supervisory duties and other disciplinary action, I believe were pretextural [*sic*]. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.
>
> III. I believe that I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> This charge has been amended to include retaliation, and the continuing violation.

The EEOC accepted Mr. Simms' amendment. The EEOC completed its investigation of the October 31, 1994 charge and, on September 25, 1996, issued a letter of determination stating that it found "reasonable cause to believe the charge is true." (App. 4a). Attempts at conciliating both Mr. Simms' retaliation and race discrimination claims failed. On October 2, 1996, the United States Department of Justice[4] issued a right-to-sue letter. *Id.* On December 31, 1996, the petitioner brought the present action alleging that the respondent discriminated against him on the basis of race and retaliation in violation of Title VII. *Id.*

On June 16, 1997, the respondent filed a motion for partial summary judgment, claiming that Mr. Simms' retaliation claims asserted in the amendment to the second charge did not relate back to the date of its filing, October 31, 1994, and were therefore time-barred. (App. 17a). The district court granted the motion on September 3, 1997, holding that Mr. Simms failed to exhaust his administrative remedies. The court found that the allegations in the amendment to the second EEOC charge related to events that occurred more than 300 days prior to the amendment and were not properly part of the charge, even though the events occurred within 300 days of October 31, 1994, and were based on the allegations in the charge that was timely filed on that date. (App. 24a). On September 11, 1997, the respondent filed a summary judgment motion with respect to Mr. Simms' remaining claims and that motion was granted on October 23, 1997. (App. 4a).

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[4]Although Mr. Simms' charge of discrimination was filed with the EEOC, where the respondent is a government or governmental agency, the Attorney General of the United States issues the notice of right to sue "[w]hen there has been a finding of reasonable cause by the [EEOC], there has been a failure of conciliation, and the Attorney General has decided not to file a civil action." 29 C.F.R. §1601.28(d)(1).

The petitioner filed a timely appeal to the United States Court of Appeals for the Tenth Circuit. Mr. Simms argued, *inter alia*, that the amendment to the charge complies with 29 C.F.R. §1601.12(b), allowing amendments to relate back to the date of the original charge, because it added "additional acts which constitute unlawful employment practices related to or growing out of" the same subject matter as the original charge: the promotion denial.

The court below affirmed the judgment of the district court, holding that Mr. Simms failed to exhaust his administrative remedies with regard to his retaliation claims:

> . . . [W]e hold that Mr. Simms' retaliation charge does not relate back under §1601.12(b) because his 1996 amendment alleges a new theory of recovery, retaliation, that he did not raise in the second EEOC charge.

(App. 8a).

Even though the EEOC had investigated the retaliation charge and attempted conciliation between Mr. Simms and the respondent, the court stated that

> [p]rohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period -- giving the employer notice and providing opportunity for administrative investigation and conciliation.

(App. 8a).

On February 4, 1999, Mr. Simms filed a timely petition for rehearing. The petition for rehearing was denied on February 24, 1999.

REASONS FOR GRANTING THE WRIT

The petitioner in this case alleges that he was subjected to racial discrimination and a series of retaliatory acts. Despite a finding by the EEOC of probable cause to believe that the petitioner was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, petitioner was prevented from presenting his retaliation claims to a jury because the courts below misconstrued the applicable EEOC regulation. That regulation, 29 C.F.R. §1601.12(b), set out *supra* at pp. 1-2, provides that amendments to timely filed charges that

> allege[] additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the [original] charge was first received.

29 C.F.R. §1601.12(b). The rulings below unnecessarily penalize lay persons who fail to attach the correct legal labels to the factual allegations in their EEOC charges. It adopts a hyper-technical reading of the phrase "related to or growing out of" which makes the legal "theory of recovery," not facts that would be known to a layperson, the determining criterion of timeliness, notwithstanding that the employer is put on notice by the original charge of the specific adverse employment action -- here the August, 1994 failure to promote Mr. Simms to Fire and Safety Officer Supervisor -- alleged to have been unlawful.

The petition for a writ of certiorari should be granted because the decision below directly and irreconcilably conflicts with the rulings of several other Circuits, as well as applicable decisions of this Court. Further, the decision resolves an important federal question in way that disrupts settled doctrine and undermines Congress' intent that Title VII provide accessible and effective remedies to eradicate

employment discrimination.

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN NUMEROUS OTHER CIRCUITS

This case concerns the Tenth Circuit's interpretation of 29 C.F.R. §1601.12(b), the EEOC regulation controlling the relation back of amendments to an EEOC charge. Substantially differing standards for applying §1601.12(b) are in use in the federal courts. Whether a claimant will receive a trial on the merits, or have his claims dismissed for failure to exhaust his administrative remedies, frequently turns solely on the district court and Circuit in which his complaint is filed. This case presents an opportunity to provide lower courts with a single, clear standard for resolving this critical issue.

EEOC regulations explicitly allow the amendment of charges of discrimination. Under the regulations, an amendment filed outside of the applicable limitations period will be considered timely if it is intended to "cure . . . omissions . . . or to clarify and amplify allegations made therein" or "alleg[es] additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." 29 C.F.R. §1601.12(b). This language makes clear that an amendment can allege new legal claims so long as those claims arose out of the same set of operative facts as were alleged in the original charge.

The court below took an exceedingly narrow view of the regulation. The Tenth Circuit's decision would allow amendments to relate back only if those amendments clarify legal theories already articulated in the original charge. (App. 8a). The result is a blanket rule prohibiting amendments alleging new legal claims even when those

claims are "related to or grow[ ] out of the subject matter of the original charge." (App. 6a). This position is untenable because nothing in the statute or regulation proscribes an amendment that includes a new legal claim.

The court below correctly observed that its opinion conflicts with those of numerous other Courts of Appeals. (App. 7a-8a). Although the Courts of Appeals have taken two general approaches to the issue, as set out below, there are several distinct standards used in the lower courts.

The Fourth and Ninth Circuits have taken an approach similar to that of the Tenth Circuit and have concluded that an amendment will not relate back if it advances a new theory of recovery, regardless of what facts were included in the original charge. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988). In addition, although the Second and Third Circuits have not directly addressed this question, two district courts in those Circuits have followed the standard adopted by the Fourth, Ninth and Tenth Circuits. *Hopkins v. Digital Equip. Corp.*, 1998 WL 702339, *2 (S.D.N.Y. 1998);[5] *Lantz v. Hospital of the Univ. of Penn.*, 1996 WL 442795, *4 (E.D. Pa. 1996).

The opinion in *Evans* demonstrates the consensus approach of the Circuits that adopt this narrow construction of the EEOC regulation. In *Evans,* the court refused to permit relation back of an amendment adding age discrimination to the original charge of sex discrimination, even though both legal claims arose out of the same facts

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[5]As with the Circuits, there is a split among the district courts in the Second Circuit. *Compare Hopkins v. Digital Equip. Corp*, 1998 WL 702339, 2 (S.D.N.Y. 1998), *with Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1565, 1572-73 (E.D.N.Y. 1990).

and circumstances described in the original charge. *Evans*, 80 F.3d at 963. The court interpreted "related to or growing out of" to mean that a new legal claim must "flow from" the old *legal claim*, not from the underlying operative facts. *Id.* Applying this standard, the court concluded that "age discrimination does not necessarily flow from sex discrimination and vice versa." *Id.* The court, however, provided no guidance in determining when one legal claim "flows" from the other.[6]

On the other hand, the Third, Fifth, Sixth and Eighth Circuits have taken a more flexible approach to the regulation and have held that the language of the regulation encompasses claims based on different legal theories that derive from the same set of operative facts included in the original charge. *See Hicks v. ABT Associates*, 572 F.2d 960, 965 (3d Cir. 1978) (where claim of sex discrimination arose out of the same facts as the claim of race discrimination set out on EEOC charge, relation back is permissible if the two claims are "directly related"); *Zanders v. O'Gara-Hess*, 952 F.2d 404 (6th Cir. 1992), 1992 U.S. App. Lexis 535 (termination following suspension that was subject of

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[6]Under this approach, few amendments have been regarded as relating back to the original charge unless they involve the overlapping statutorily protected categories of race, color, and national origin. *See, e.g., Kahn v. Pepsi Cola Bottling Group*, 526 F. Supp. 1268, 1270 (E.D.N.Y. 1981)(national origin and race); *Adames v. Mitsubishi Bank*, 751 F. Supp. 1572 (race, color, national origin connected); *cf. St. Francis College v. Al-Kharzaji*, 481 U.S. 604, 614 (1987)(Brennan, J. concurring) (ethnicity and national origin overlap as a legal matter under Title VII); *Ahmed v. Samson Management Corp.*, 1996 WL 183011, *6 (S.D.N.Y. 1996) (noting that in Title VII context, national origin claims may be treated as ancestry or ethnicity claims). *Compare, e.g., Evans*, 80 F.3d 954 (sex and age not sufficiently related); *Pejic*, 840 F.2d 667 (national origin and age not sufficiently related); *Hopkins*, 1998 WL 702339 (race, disability and retaliation not sufficiently related); *Lantz*, 1996 WL 442795 (disability and age not sufficiently related).

charge); *Anderson v. Block*, 807 F.2d 145, 149 (8th Cir. 1986) (same); *Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) ("other" box checked, age and retaliation written in, but references to sex in factual statement held sufficient to constitute charge on that basis); *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-1076 (8th Cir. 1982) (second charge properly treated as amendment of first); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 464 (5th Cir. 1970) (national origin amendment to original charge on which "sex" box was checked)[7]. In addition, although the First and Second Circuits have not addressed the question directly, two district courts in those Circuits have also adopted a similar approach. *Conroy v. Boston Edison Co.*, 758 F. Supp. 54, 58 (D. Mass. 1991); *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1565, 1573 (E.D.N.Y. 1990).

Underlying the opinion in *Sanchez* and its progeny is the recognition that "a large number of the charges filed with [the] EEOC are filed by ordinary people unschooled in the technicalities of the law." *Sanchez*, 431 F.2d at 463 (internal citations omitted); *accord Washington*, 671 F.2d at 1076; *Conroy*, 758 F. Supp. at 60; *Adames*, 751 F. Supp. at 1572. Therefore, these courts hold, procedural rules governing Title VII must be sufficiently liberal to protect their rights. Moreover,

> the crucial element of a charge of discrimination is the factual statement contained therein. . . The selection of the type of discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal

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[7]Although the Fifth Circuit allows the amendment as a "technical amendment" it is evident from the opinion that the additional allegations and inclusion of a new legal theory were substantive and of the same nature as in the other decisions cited. *Sanchez*, 431 F.2d at 458-59.

> conclusion to the facts alleged. In the context of a statute like Title VII it is inconceivable that a charging party's rights should be cut off merely because he fails to articulate correctly the legal conclusion emanating from his factual allegations.

Sanchez, 431 F.2d at 462.

Despite these commonalities, each of these Circuits have taken slightly different routes to reach the conclusion that claims related to the operative facts of the original charge are not time-barred. In *Hornsby v. Conoco, Inc.*, the Fifth Circuit followed the teachings of *Sanchez*, and applied the bright line rule of allowing amendments containing new legal theories to relate back where those theories are based on facts in the original charge. *Hornsby*, 777 F.2d at 247; *Sanchez*, 431 F.2d at 462.

Another group of courts have utilized a "scope of the investigation" and "like or reasonably related" analysis to determine whether claims are time-barred.[8] In *Washington v. Kroger*, the court began its inquiry by focusing on the factual statement in the original charge to determine whether it supported the new legal theory alleged in the amendment. 671 F.2d at 1076. Next, the court looked

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[8]The "scope of the investigation" and the "like or reasonably related" doctrines are inquiries distinct from the question whether amendments relate back to the date of the original charge, although the result is the same. These two doctrines

> revolve[] around the principle that the scope of a civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the [ ] investigation could reasonably be expected to uncover.

Conroy, 758 F. Supp. at 58.

beyond the words of the charge to discern whether, "[h]ad the EEOC "investigated plaintiff's first charge, it is reasonable to suppose that it would have uncovered the related incidents that underlay the [amendment]." *Id.* This hybrid approach has also been followed by several district courts. *See, e.g. Rizzo v. WGN Continental Broad., Co.*, 601 F. Supp. 132, 134 (N.D. Ill. 1985) (although the court focused on the underlying facts and not legal conclusions, the court used "like or reasonably related" and "scope of investigation" standards to determine relation back of amendment); *Adames*, 751 F. Supp. at 1573 (same); *Drummer v. DCI Contracting Corp.*, 772 F. Supp. 821, 826 (S.D.N.Y. 1991) (applies "like or related to" standard); *Warren v. Halstead Indus.*, 1983 WL 544, *4 (M.D.N.C. 1983) (erroneously stating that scope of investigation test is codified in 29 C.F.R. §1601.12(b)).

A district court in the First Circuit applied yet another approach. In *Conroy v. Boston Edison Co.*, while stating that "[a]n amendment is said to grow out of the same subject matter as the initial charge where the protected categories are related . . . ." 758 F. Supp. at 58, the court went beyond this approach to hold that: "[e]ven where the amendment alleges a new protected category . . . it will still relate back where the predicate facts underlying each claim are the same." *Id.*

The circumstances of this case crystallize the practical consequences of those differing standards. The petitioner's retaliation amendment was held to be time-barred by the Tenth Circuit because, although it grew out of the same facts as in the original charge, it alleged a legal claim distinct from his initial claim of racial discrimination. However, had the petitioner been in one of the Circuits allowing amendments alleging additional legal claims to relate back when the amendment flows from the same facts as in the original charge, he would have had the opportunity to present his retaliation claims to a jury.

This case presents squarely for review the sole issue of what standard should guide federal courts in determining when amendments to an EEOC charge relate back to the date of the original charge. The Writ of Certiorari should be issued to resolve this mature and irreconcilable conflict among the Circuits.

II.

THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

The decision below decides an important question in a way that fundamentally undermines Congress' intent in establishing the Title VII administrative and litigative processes. The court interprets the EEOC regulation in a manner that is wholly inconsistent with the Title VII enforcement scheme. Under the Tenth Circuit rule, laymen must act with the knowledge and precision of trained lawyers or risk losing the right to pursue their legal claims. The opinion below, therefore, threatens the effectiveness of Title VII as a tool to combat employment discrimination.

In *Sanchez*, the court carefully and precisely spelled out why complainants must be granted latitude in identifying the legal claims in their EEOC charges:

> While the distinction between [ ] two types of discrimination will undoubtedly be crystal clear to a lawyer delving into the law books to research a legal question, it may not be so apparent to an uneducated layman who is required to put pen to paper and, by filling out a form, to articulate his grievance as best he can without expert legal advice.

431 F.2d at 463 n.4 (internal citations omitted). This reality necessitates liberal construction of procedural rules if the

rights of Title VII plaintiffs are to be adequately protected.

Congress and the EEOC created a "user-friendly" administrative system for the assertion of rights under Title VII and other antidiscrimination statutes that enables lay complainants to present their claims initially, without the assistance of attorneys.[9] *See Zipes v. Trans World Airlines, Inc. Indep. Fed'n of Flight Attendants*, 455 U.S. 385, 397 (1982); *Love v. Pullman*, 404 U.S. 522, 527 (1972). This important objective is served by simplicity and flexibility in the procedural requirements for asserting discrimination claims.

The objective of requiring a charging party to exhaust his administrative remedies by filing a charge with the EEOC is to place the charged party on notice of alleged violations, to give the EEOC sufficient information to investigate, and to provide the parties an opportunity to conciliate. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 342 (1997); *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 127 (7th Cir. 1989); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 905 (7th Cir. 1981). The rule adopted by the Tenth Circuit undermines the administrative scheme adopted by Congress for this purpose.

Where, as here, the EEOC has thoroughly investigated the charge as amended and provided the parties with an opportunity to conciliate all claims, the purpose of the statutory exhaustion requirement is not furthered by denying a complainant the opportunity to pursue those claims in federal court. In addition, the respondent cannot be said to have been prejudiced in any manner if petitioner

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[9]In fact, EEOC regulations explicitly state that its "rules and regulations shall be liberally construed to effectuate the purpose and provisions of title VII . . . ." 29 C.F.R. §1601.34.

is permitted to proceed on his retaliation claim.[10]

The opinion below is also inconsistent with the established procedure for filing a charge of discrimination with the EEOC. One avenue for filing a charge with the EEOC is to complete a charge form. On the form, the complainant is instructed to indicate the cause of discrimination by checking the box or boxes that describe the type of discrimination suffered from among several listed.[11] Next, the form requests the complainant to provide a statement describing the alleged discriminatory action. The form contains no additional instructions alerting complainants to the significance of the selection of which boxes to check. In this case Mr. Simms' failure to check the "retaliation" box had the consequence, in the view of the court below, of completely cutting off his right to bring his retaliation claims before a court even though they were

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[10]For example, once petitioner's original 1994 charge was filed, respondent was required to preserve all of its "personnel records relevant to the charge" until its final disposition. 29 C.F.R. §1602.14. The regulation continues:

> The term "personnel records relevant to the charge," for example, would include personnel or employment records related to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person . . . .

It is inconceivable in light of this regulation that a respondent charged with denying a specific promotion based on race could justifiably assert that it was led by such a charge to discard records relevant to rebutting a claim of retaliation in denying the promotion, so that its defense has been prejudiced. Certainly no such assertion was ever made here.

[11]Mr. Simms' original and amended EEOC charges of discrimination are reproduced in the Appendix following pp. 29a and 31a.

investigated and unsuccessfully conciliated by the EEOC.

Ironically, the court below is enforcing a more rigorous administrative "pleading" requirement than is imposed on plaintiffs represented by attorneys in federal district court in two respects. First, under Federal Rule of Civil Procedure 15(c)(2), an amendment to a pleading relates back to the date of the original pleading if "the claim or defense asserted in the amended pleading arose out of the conduct, *transaction*, or *occurrence* set forth or *attempted to be set forth* in the original pleading." FED. R. CIV. P. 15(c)(2) (emphasis added). Courts have interpreted this rule so that

> a new substantive claim that would otherwise be time-barred relates back to the date of the original pleading, provided the new claim stems from the same 'conduct, transaction, or occurrence' as was alleged in the original complaint; for relation back to apply, there is no additional requirement that the claim be based on an identical theory of recovery.

Bularz v. Prudential Ins. Co. of Am., 93 F.3d 372, 379 (7th Cir. 1996); *accord Pena v. United States*, 157 F.3d 984, 987 (5th Cir. 1998); *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1543 (8th Cir. 1996); *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir. 1993); *Federal Deposit Ins. Corp. v. Bennett*, 898 F.2d 477, 479-80 (5th Cir. 1990).[12]

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[12]*Cf. City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, __, 139 L. Ed. 2d 525, 535-36 (1997), holding that the supplemental jurisdiction of federal courts extends to

> state law claims that "derive from a common nucleus of operative fact," such that "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" . . . The state and federal claims "derive

Second, the Tenth Circuit approach contrasts starkly with the liberal pleading requirements of FED. R. CIV. P. 8(a). Rule 8(a) requires that pleadings in federal court contain "a short and plain statement of the claim showing that the pleader is entitled to relief"; it does not require the plaintiff to plead legal theories. FED. R. CIV. P. 8(a)(2); *B. Sanfield, Inc. v. Finaly Fine Jewelry Corp.*, 168 F.3d 967, 973 (7th Cir. 1999); *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 730, n.8 (7th Cir. 1998). *See also* FED. R. CIV. P. 8(e)(1). This interpretation of Rule 8 "indicates the objective of the rules to avoid technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the claim . . . ." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1215, 136-138 (1990); *accord Caribbean Broad. System, Ltd., v. Cable & Wireless PLC*, 148 F.3d 1080, 1085-86 (D.C. Cir. 1998).

Similarly, under EEOC regulations, a Title VII complainant's EEOC charge need only "describe generally the action or practices complained of"; complainants are not required to articulate in their EEOC charges the precise legal theories which they will later assert in a Title VII lawsuit. 29 C.F.R. §1601.12(b); *accord Oates v. Discovery Zone*, 116 F.3d 1161, 1176 (7th Cir. 1997)(D. Wood, J. concurring in part and dissenting in part)("it is enough both for EEOC charges . . . and for federal complaints to set forth the facts that will form a basis for relief[; p]laintiffs are not under any legal obligation to plead legal theories");

> from a common nucleus of operative fact," *Gibbs*, supra, at 725, namely, ICS's unsuccessful efforts to obtain demolition permits from the Chicago Landmarks Commission.

(bracketed material in original), *quoting United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Bridges v. Eastman Kodak Co., 822 F. Supp. 1020, 1026 (S.D.N.Y. 1993) (plaintiffs are not required to state legal theories in their EEOC charges); *cf. Sanchez*, 431 F.2d at 463 ("the only absolutely essential element of a timely charge of discrimination is the allegation of fact contained therein"). The ruling below requires the lay person to go beyond accurately describing all relevant facts, to denominate precisely the legal implications of those facts. This is contrary to Congressional intent and defeats the objectives of the EEOC administrative process.

The Tenth Circuit's approach also compromises the "scope of the investigation" rule. This doctrine

> revolves around the principle that the scope of a [Title VII] civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the [ ] investigation could reasonably be expected to uncover.

Conroy, 758 F. Supp. at 58; *accord Robinson v. H. Dalton*, 107 F.3d 1018, 1025 (3rd Cir. 1997) (discussing "scope of investigation" rule); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 481 (7th Cir. 1996)(discussing "like or reasonably related" doctrine[13]); *Washington v. Jenny Craig Weight Loss Centres*, 3 F. Supp.2d at 947-48 (N.D.Ill. 1998)(discussing "scope of investigation" and "like or reasonably related" rules). Courts have liberally interpreted this requirement to ensure that meritorious claims are not turned aside because of procedural technicalities. *See Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994);

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[13]The scope of the investigation rule and the "like or reasonably related" doctrine are essentially the same inquiry. *See Washington v. Jenny Craig Weight Loss Centres*, 3 F. Supp. 2d 941, 947 (N.D. Ill. 1998).

Jenny Craig, 3 F. Supp. 2d at 947.

Wholly inconsistent with this well-settled doctrine, the Tenth Circuit has adopted an approach that makes the legal claims, rather than the facts, the focus of the EEOC charge and would disallow any claim or amendment not articulated in the original complaint. In contrast, the "scope of the investigation" rule provides that "where the factual statement in a plaintiff's written charge should have alerted the agency to an alternative basis of discrimination, and should have been investigated, the plaintiff will be allowed to allege this claim in his or her complaint regardless of whether it was actually investigated." *Conroy*, 758 F. Supp. at 58.

Mr. Simms' case typifies the potential for injustice in jurisdictions that follow the Tenth Circuit approach. As a result of the Tenth Circuit's narrow construction, Mr. Simms was effectively barred from vindicating his rights because of steps he took during the administrative process while unrepresented by counsel. Although his original claim of race discrimination was found to be timely, he was barred from pursuing a claim that the EEOC found cause to believe was true simply because he did not check the appropriate box on his EEOC charge form. Because this approach frustrates the national policy of extirpating employment discrimination that is embodied in Title VII, this Court should grant review to correct this error.

III.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT

The standard applied by the Tenth Circuit is inconsistent with this Court's rulings concerning the technical burdens that should be placed on Title VII complainants at the start of the administrative process and the level of deference that should be given to the EEOC's interpretation of the statute and of its own regulations.

A. Avoiding the Imposition of Technical Requirements upon Lay Persons

This Court's opinions in *Love v. Pullman*, 404 U.S. 522 (1972)[14] and *Zipes v. Trans World Airlines, Inc. Indep. Fed'n of Flight Attendants*, 455 U.S. 385 (1982)[15] gave effect

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[14]In *Love*, the Tenth Circuit affirmed a grant of summary judgment on the grounds that the plaintiff had failed to exhaust his state remedies where his charge was tendered to the EEOC, the EEOC referred the charge to the state agency, and then the EEOC formally filed it once the state deferral agency indicated that proceedings before it were terminated. By this time the charge would have been time-barred had it not earlier been presented to the EEOC. 404 U.S. at 525. In reversing the decision of the Tenth Circuit, this Court held that the filing procedure followed there fully complied with the purpose of the filing requirements and that the respondent could make no showing of prejudice to its interests. *Id.* at 526. Moreover, the Court held that the procedure endorsed by the Tenth Circuit "would serve no purpose other than the creation of an additional procedural technicality," inappropriate where laymen are acting without the assistance of counsel. *Id.* at 526-27.

[15]In *Zipes*, this Court, based on the principle enunciated in *Love*, held that the time for filing a charge with the EEOC was not jurisdictional, but was a limitations period subject to waiver and equitable tolling.

to a guiding principle for construing the provisions of Title VII: the procedural requirements of Title VII should not be applied with technical stringency to the claims of uncounselled complainants. *Zipes*, 455 U.S. at 397; *Love*, 404 U.S. at 527; *cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 816, n.19 (1980) ("[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, . . . at least when dealing with 'a statutory scheme in which laymen unassisted by trained lawyers initiate the process'")(quoting *Love*).[16]

The ruling below departs from this tradition. It neither promotes the requirements of Title VII nor respects the realities of the lay-initiated administrative process.[17]

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[16]As *Mohasco* demonstrates, this Court has held lay complainants to precise requirements of which they would reasonably be made aware by a reading of the statute. But this is a far cry from penalizing a lay person for checking the wrong box on a form -- especially absent a showing of prejudice to the entity charged.

[17]Unfortunately, this is only one example of the general problem of plaintiffs finding themselves limited by actions taken without benefit of counsel during the administrative process. For example, some courts have refused to permit a charging party to bring a class action suit under FED. R. CIV. P. 23 unless the charge itself used the word "class," even though on the EEOC's form there is no box to check to indicate the complainant's desire to raise class claims and no instructions alerting complainants that special care must be given to preserve the right to bring a class action. Other courts, cognizant that complainants may be unaware of what "key words" can trigger class action notification, are more generous in construing the charge. *E.g.*, *Paige v. California*, 102 F.3d 1035, 1041 (9th Cir. 1996); *Fellows v. Universal Restaurant*, 701 F.2d 447, 451 (5th Cir. 1983).

Paralleling the situation with respect to "relation back" of amendments to charges, there is a conflict among the Circuits as to class actions. The Ninth and Fifth Circuit have adopted approaches liberally construing charges and allowing class claims where an EEOC investigation of class discrimination could reasonably be expected to

B. Deference to Agency Interpretations

The Tenth Circuit also failed to afford the EEOC's interpretation of its regulations the appropriate level of deference. It is well settled that

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

Chevron v. Natural Resources Defense Council, Inc., 467 U.S.

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check to indicate the complainant's desire to raise class claims and no instructions alerting complainants that special care must be given to preserve the right to bring a class action. Other courts, cognizant that complainants may be unaware of what "key words" can trigger class action notification, are more generous in construing the charge. *E.g.*, *Paige v. California*, 102 F.3d 1035, 1041 (9th Cir. 1996); *Fellows v. Universal Restaurant*, 701 F.2d 447, 451 (5th Cir. 1983).

Paralleling the situation with respect to "relation back" of amendments to charges, there is a conflict among the Circuits as to class actions. The Ninth and Fifth Circuit have adopted approaches liberally construing charges and allowing class claims where an EEOC investigation of class discrimination could reasonably be expected to grow out of the allegations in the charge. *See e.g.*, *Paige*, 102 F.3d at 1041 (EEOC charge alleging discriminatory denial of promotion could support action challenging overall promotional process); *Fellows*, 701 F.2d at 451 (allowing class claims because allegation in charge that plaintiff discriminated against "because of my sex, female" could lead to EEOC investigation of class discrimination). The Seventh Circuit has taken a more restrictive view of the requirement, essentially ignoring the actual or potential scope of the EEOC investigation. *See, e.g. Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 128 (7th Cir. 1989)(court found charge, which led to investigation that sought "payroll records for all sales persons and an explanation for the differences between the salaries of male and female sales persons," insufficient to support class action).

837, 843 (1984), *quoting Morton v. Ruiz*, 415 U.S. 199, 231 (1974)(alteration in original). Furthermore, "such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

In accepting, investigating, and attempting to conciliate Mr. Simms' amended EEOC charge, the EEOC interpreted its regulation to allow Title VII complainants to amend their charge to include new legal theories that grow out of the operative facts articulated in the original charge. Under the standard established in *Chevron*, the Tenth Circuit should have given deference to the EEOC's interpretation of the statutory and administrative scheme. First, Congress has given the EEOC explicit "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. §2000e-12(a). Second, the regulation at issue goes to the heart of the EEOC's role in the enforcement of Title VII: investigating and conciliating charges of discrimination in the first instance. Finally, this approach, as discussed above, is consistent with the language, purpose and enforcement scheme of Title VII. Accordingly, the Tenth Circuit should have given greater deference to the EEOC's interpretation of 29 C.F.R. §1601.12(b).[18]

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[18]Decisions of this Court giving limited deference to EEOC interpretations have done so recognizing that "Congress, in enacting Title VII, did not confer upon the EEOC [general] authority to promulgate rules or regulations." *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). In those circumstances the level of deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 141. The EEOC interpretation of 29 C.F.R. §1601.12(b) should be given greater deference because Congress has given the EEOC explicit authority to issue procedural regulations. 42 U.S.C. §2000e-12(a).

The Writ of Certiorari should be issued to address the conflict between the foregoing decisions of this Court and the decisions below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

PUBLISH
No. 97-6366
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CEDRIC D. SIMMS,
Plaintiff-Appellant,

v.

THE STATE OF OKLAHOMA,
ex. rel., The Department of
Mental Health and Substance Abuse
Services, a state agency,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D. Ct. No. CIV-96-2158-A)

Before **Tacha, Briscoe,** and **Murphy,** Circuit Judges.

Tacha, Circuit Judge.

Plaintiff-Appellant Cedric D. Simms appeals two orders of the district court granting summary judgment in favor of defendant, the Oklahoma Department of Mental Health and Substance Abuse Services ("DMHSAS") on claims of unlawful employment discrimination and retaliation. On appeal, plaintiff argues that: (1) his pre-1995 retaliation claims are not time-barred and (2) the district court erred in granting summary judgment on his failure to promote claim because he presented sufficient evidence of pretext, creating a genuine dispute as to an issue of material fact. We exercise jurisdiction pursuant to 28 U.S.C.§ 1291 and affirm.

The procedural history of this case is somewhat complicated. Mr. Simms, an African-American, began his employment with defendant at Griffin Memorial Hospital around April 29, 1991, as a Fire and Safety Officer I. On September 11, 1991, defendant posted a job announcement for the position of Fire and Safety Officer II. Mr. Simms applied for the position, but defendant gave it to a white employee whom he thought was less qualified. Consequently, he filed a charge with the Equal Employment Opportunity Commission ("EEOC") on October 12, 1992 (No. 311930053), alleging that defendant refused to promote him because of his race. The EEOC issued a right-to-sue letter and, on December 21, 1993, Mr. Simms filed an action in federal court pursuant to Title VII of the Civil Rights Act ("Title VII"). The parties settled this action ("Simms I") on April 13, 1994. Under the settlement agreement, defendant promoted Mr. Simms to the position of Fire and Safety Officer II. Although the court stated that DMHSAS should waive its standard six-month probationary period for plaintiffs, defendant's employees Carol Kellison and Stand LaBoon withheld Mr. Simms' supervisory duties until June 20, 1994.

Ten days later, defendant posted a job announcement for the position of Fire and Safety Officer Supervisor. The job announcement stated that "PREFERENCE WILL BE GIVEN TO APPLICANTS WITH SUPERVISORY EXPERIENCE." Appellant's App. at 376. Mr. Simms applied and interviewed for the position. Mr. Simms and Bruce Valley, a white employee under Mr. Simms' supervision but who had numerous years of supervisory experience in the construction industry, received the highest scores in the first round of interviews. A panel including Carol Kellison and Stand LaBoon interviewed both men in a second round and ultimately gave the promotion to Mr. Valley. As a result, Mr. Simms filed a second EEOC charge (No. 311950136) on October 31, 1994, alleging that defendant unlawfully failed to promote him based on his

race.

After filing the second EEOC charge, Mr. Simms' relationship with the defendant deteriorated. In March 1995, defendant reprimanded him for "distribution of unauthorized material" and, in April 1995, defendant suspended him for "insubordination, not devoting full time, attention and effort to the duties and responsibilities of position during assigned hours of duty, and failure or inability to perform the duties in which employed." Appellant's App. at 83. On June 5, 1995, Mr. Simms filed a third EEOC charge (No. 311950898) alleging that these acts were in retaliation for filing and pursuing his second EEOC charge. On July 20, 1995, Mr. Simms received his first adverse job performance evaluation. Defendant demoted him to Fire and Safety Officer I on August 13, 1995, and ultimately terminated his employment on September 22, 1995.

On November 29, 1995, Mr. Simms received an EEOC right-to-sue letter regarding his third EEOC charge. He brought aa Title VII action in federal court ("Simms II") on January 12, 1996, alleging race-based employment discrimination and retaliation, including allegations of retaliatory acts occurring prior to 1995 and not covered by his third EEOC charge. At the time he commenced Simms II, he had not yet received a right-to-sue letter for his second EEOC charge. On July 13, 1996, DMHSAS filed a motion for partial summary judgment on the grounds that Mr. Simms had failed to exhaust his administrative remedies as to his race discrimination and pre-1995 retaliation claims. Two days later, Mr. Simms filed an amendment to his second EEOC charge. The amendment contained allegations of pre-1995 acts of retaliation, including withholding of supervisory duties for the Fire and Safety Officer II position and failure to promote him to the Fire and Safety Supervisor position. On September 3, 1996, the district court granted defendant's motion for partial

summary judgment, leaving only the post-1995 retaliation claims for trial.

The EEOC completed its investigation of the second EEOC charge on September 25, 1996, and issued a letter of determination stating that it found "reasonable cause to believe the charge is true." Appellant's App. at 274. A right-to-sue letter followed on October 2, 1996. Based on these events, plaintiff asked the district court to reconsider its September 3 Order in Simms II. The court denied Mr. Simms' motion for reconsideration on October 23, 1996. On December 31, 1996, plaintiff brought the present action ("Simms III") reasserting the claims that were dismissed in Simms II for failure to exhaust administrative remedies.

On January 6, 1997, Simms III was transferred to the district court judge presiding over Simms II, and plaintiff filed a motion to consolidate the two cases. The district court denied the motion because it would delay Simms II, which was set for trial in a week. The remaining claims in Simms II were tried to a jury. The jury found in favor of DMHSAS on the retaliatory discharge claim, but found against DMHSAS on the other post-1995 retaliation claims (the reprimand, suspension, negative performance evaluation, and demotion). On February 26, 1997, the trial court entered judgment in accordance with the jury's verdict.

On June 16, 1997, DMHSAS filed a motion for partial summary judgment in Simms III, claiming that Mr. Simms' pre-1995 retaliation claims were time-barred and did not relate back to his original second EEOC charge. The trial court granted the motion on September 3, 1997, holding that Mr. Simms failed to exhaust administrative remedies. The district court found Mr. Simms' amendment to his second EEOC charge neither timely nor related to the activities contained in the original charge. On September 11, 1997, defendant filed a summary judgment motion with respect to plaintiff's remaining claims in Simms III. The

court granted defendant's motion on October 23, 1997. The trial court denied plaintiff's motion for reconsideration of the two orders, and this appeal followed.

Standard of Review

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. *See Byers v. City of Albuquerque* 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine-issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Byers*, 150 F.3d at 174.

Although the movant must show the absence of a genuine issue of material fact, he or she need not negate the nonmovant's claim. *See, e.g., Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). Once the movant carries this burden, the nonmovant cannot rest upon his or her pleadings, but "must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which [he or she] carries the burden of proof." *Id.* "The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is "genuine'; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant." *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997). If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law. *See Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996).

I. Pre-1995 Retaliation Claims - Exhaustion Doctrine

A plaintiff must generally exhaust his or her administrative remedies prior to pursuing a Title VII claim in federal court. *See, e.g., Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). Thus, a plaintiff normally may not bring a Title VII action based upon claims that were not part of a timely-filed EEOC charge for which the plaintiff has received a right-to-sue letter. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 342 (1997). To be timely, a plaintiff must file the charge with the EEOC within 180 days or with a state agency within 300 days of the complained-of conduct. *See* 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. § 1601.13 (1998); *Gunnell v. Utah Valley St. College*, 152 F.3d 1253, 1260 n.3 (10th cir. 1998). However, 29 C.F.R. § 1601.12(b) provides that certain amendments may relate back to the filing date of the original charge and, therefore, be considered timely even if the amendment takes place after the deadlines set forth in § 1601.13. To relate back, an amendment must (1) correct technical defects or omissions; (2) clarify or amplify allegations made in the original charge; or (3) add additional Title VII violations "related to or growing out of the subject matter of the original charge." *Id.* § 1601.12(b).

Mr. Simms argues that the 1996 amendment to his second EEOC charge complies with § 1601.12(b) and that his pre-1995 retaliation claims are therefore part of a timely-filed EEOC charge. For this to be true, the amendment must have either clarified or amplified allegations made in Mr. Simms' second EEOC charge or addressed matters that related to or grew out of the race discrimination claim in that charge.[1] We agree with the district court that the 1996

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[1]Mr. Simms' amendments are not technical amendments (e.g., correcting a name or address), rather they go to the substance of the charge.

amendment did not clarify or amplify allegations in the second EEOC charge because the original charge, even when construed liberally, contained no mention of the theory of retaliation or facts supporting such a claim.

Whether the pre-1995 retaliation claims contained in the 1996 amendment related to or grew out of the race discrimination claim in the second EEOC charge is a closer question. Some courts have held that this language encompasses claims based on different legal theories that derive from the same set of operative facts included in the original charge. *See Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th cir. 1985); *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-76 (8th Cir. 1982); *Alexander v. Precision Machining, Inc.*, 990 F. Supp. 1304, 1310 (D. Kan. 1997); *Conroy v. Boston Edison Co.*, 758 F. Supp. 54, 58 (D. Mass. 1991); *cf. Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir. 1998) (stating that disability discrimination claim would not relate back to age discrimination claim, but court might have been more sympathetic had plaintiff "alleged facts that supported both claims" in the first complaint).[2] Other courts have concluded that an amendment will not relate back when it advances a new theory of recovery, regardless of the facts included in the original complaint. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996) (denying relation back for age discrimination claim to sex discrimination claim); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988) (same); *Hopkins v. Digital Equip. Corp.*, 1998 WL 702339, at *2 (S.D.N.Y. Oct. 8, 1998) (stating that retaliation and disability claims in amended charge did not relate back to date of

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[2]Some courts have gone further and held that an "amendment is said to grow out of the same subject matter as the initial charge where the protected categories are related, as is the case, for example, with race and national origin." *Conroy*, 758 F. Supp. at 58. That, however, is not the case here.

original charge, which only alleged race discrimination, "even though those claims are based on incidents described in the original charge, since neither disability nor retaliation claims flow from race discrimination claims"). In *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1260 n.3 (10th Cir. 1998), this court followed the latter position, noting that when an original EEOC claim alleged only retaliation, plaintiff's amendment to add a sexual harassment claim did not relate back to the original charge pursuant to 29 C.F.R. § 1601.12(b). Applying the analysis from *Gunnell*, we hold that Mr. Simms' retaliation charge does not relate back under § 1601.12(b) because his 1996 amendment alleges a new theory of recovery, retaliation, that he did not raise in the second EEOC charge. Prohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period - giving the employer notice and providing opportunity for administrative investigation and conciliation. *See Evans*, 80 F.3d at 954; *cf. Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994) (finding exhaustion is not required for a retaliation claim filed during the pendency of a discrimination claim and based on acts that occurred *after* the filing of the discrimination claim because the employer already has notice and there is little chance a second administrative complaint would lead to conciliation). Therefore, Mr. Simms' pre-1995 retaliation claims were not part of a timely-filed EEOC charge, and he has not exhausted his administrative remedies with respect to these claims.

Even though Mr. Simms did not properly exhaust administrative remedies, our inquiry as to whether this court may hear the retaliation claims has not come to an end. This court has adopted a limited exception to the exhaustion rule for Title VII claims when the unexhausted claim is for "discrimination like or reasonably related to the allegations of the EEOC charge." *Ingels*, 42 F.3d at 625 (quoting *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th cir. 1988)). We have construed the "reasonably related"

exception to include most retaliatory acts *subsequent* to an EEOC filing. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 342 (1997). "However, where a retaliatory act occurs *prior to the filing* of a charge and the employee fails to allege the retaliatory act or a retaliation claim in the subsequent charge, the retaliatory act ordinarily will not reasonably relate to the charge." Id. (emphasis added); *see also Hopkins*, 1998 WL 702339, at *3.

In *Seymore*, the plaintiff filed a discrimination complaint with the state human rights commission and was subsequently discharged from her job. She filed an EEOC complaint nine days after her termination which alleged race and sex discrimination. In district court, though, plaintiff also alleged retaliation. *See Seymore*, 111 F.3d at 796. This court found the plaintiff had failed to exhaust administrative remedies on the retaliation claim because she was aware of the facts constituting that claim at the time of her EEOC filing. *See id.* at 799-800. This case is analogous to *Seymore*. All of Mr. Simms' allegations of pre-1995 retaliation concerned facts occurring prior to the filing of the second EEOC complaint. Thus, Mr. Simms does not qualify for the "reasonably related" exception, and we may not excuse his failure to exhaust his administrative remedies with respect to his pre-1995 retaliation claims. We affirm the district court's grant of summary judgment in favor of defendant on these claims.[3]

II. Race Discrimination Claim - Pretext Analysis

In determining whether to grant summary judgment on a Title VII claim, we apply the burden-shifting

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[3]While plaintiff also included the post-1995 retaliation claims in his brief, he concedes that he is not attempting to relitigate these claims, upon which a jury passed judgment in Simms II.

framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this approach, the plaintiff initially bears the burden of production to establish a prima facie case of a Title VII violation. *See McDonnell Douglas*, 411 U.S. at 802. "To carry the initial burden of establishing a prima facie case of race discrimination for a failure to promote claim, the plaintiff must typically show that he or she (1) belongs to a minority group; (2) was qualified for the promotion; (3) was not promoted; and (4) that the position remained open or was filled with a non-minority." *Reynolds v. School Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1534 (10th Cir. 1995). Once a plaintiff has met this burden, discriminatory intent on the part of the defendant is presumed and the burden shifts to the defendant to "articulate a facially nondiscriminatory reason for the challenged employment action." *Id.* at 1533; *see also Beaird v. Seagate Tech.*, 145 F.3d 1159, 1165 (10th Cir. 1998), *cert. denied.* --S. Ct.--, 67 U.S.L.W. 2182 (Dec. 14, 1998). If the defendant provides a nondiscriminatory reason for the employment action, the plaintiff may defeat summary judgment by presenting sufficient evidence such that a reasonable jury could conclude that the proffered nondiscriminatory reason for the employment action is pretextual, that is, "unworthy of belief." *See Beaird*, 145 F.3d at 1165 (quoting *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995)). *But cf. id.* at 1176 (Tacha, J., concurring in part, dissenting in part) ("Not only must the plaintiff produce evidence of pretext, but the pretextual evidence must be of the nature or quality from which a reasonable jury could infer illegal discrimination."). Evidence of pretext may include, but is not limited to, the following: prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating hiring criteria); and the use of subjective criteria. *See Colon-Sanchez v. Marsh*, 733 F.2d 78, 81 (10th Cir. 1984); *see also Beaird*, 145 F.3d at 1168.

Plaintiff has made a prima facie showing of race-based discrimination. He was qualified for the position of Fire and Safety Officer Supervisor, but DMHSAS awarded the job to Mr. Valley, a non-minority. However, DMHSAS has advanced a nondiscriminatory reason for its decision to promote Mr. Valley over Mr. simms: Mr. Valley was more qualified because he had significantly greater supervisory experience. Indeed, the record reflects that Mr. Valley's supervisory experience far exceeds that of Mr. Simms. Consequently, the issue becomes whether Mr. Simms has provided sufficient evidence that the reason advanced by DMHSAS is pretextual.

Mr. Simms offers a variety of evidence that he claims shows pretext. Although he does not directly attack the truthfulness of defendant's nondiscriminatory reason for promoting Mr. Valley (that Mr. Valley did not have more supervisory experience than Mr. Simms), Mr. Simms attempts to demonstrate that supervisory experience was not the true reason for the defendant's promotion decision. After careful review, we find that the evidence offered by Mr. Simms, even when taken in the light most favorable to plaintiff, is insufficient for a reasonable jury to conclude that defendant's proffered reason for failing to promote Mr. Simms is "unworthy of belief."

Mr. Simms claims that various "procedural irregularities" lead to an inference of pretext. The alleged irregularities include the decision to have a second round of interviews, testimony that the candidate with the highest first-round score is often selected for the job, the emphasis on supervisory experience in the job posting, and the fact that Stand LaBoon, the hospital superintendent, sat on the second round interview panel when he usually only interviews candidates for more senior positions. However, these allegations of procedural irregularities do not support a reasonable inference of pretext because they are consistent with the defendant's published policies for selecting

candidates for promotion. For example, the job posting itself indicated a second round of interviews might be held, and this was consistent with DMHSAS policy. Similarly, the fact that Simms scored slightly higher in the first round of interviews[4] does not show pretext, as the difference in scores is minimal and plaintiff provides no evidence showing DMHSAS has a policy of always hiring the candidate with the highest first-round score. To the contrary, the difference between Mr. Simms' and Mr. Valley's scores provides an explanation for why an additional round of interviews was warranted. The emphasis on supervisory experience in the job posting also raises no suspicions considering the job--Fire and Safety Officer *Supervisor*. Moreover, plaintiff has provided no evidence that the supervisory preference was illegitimate or that it was unusual to include such a preference in a supervisor job posting. *Cf. Randle*, 69 F.3d at 453-54 (denying employer's summary judgment motion in a failure to promote claim because employer's assertion that plaintiff was unqualified for a position due to insufficient education was called into question by the fact that the person who got the job also did not meet the education requirement listed in the job posting); *Mohammed v. Callaway*, 698 F.2d 395, 399-401 (10th Cir. 1983) (reversing entry of judgment for employer where employer hired non-minority who did not meet specific job education requirements over minority candidate who was fully qualified). Finally, the fact that Stand LaBoon sat on the interview panel is not particularly troubling, since he retained ultimate hiring discretion for the position. Additionally, Mr. LaBoon ranked the two candidates equally in his evaluation, while the other two panel interviewers scored Mr. Valley higher. In sum, there is nothing about the defendant's actions in the interview process to support a reasonable inference of pretext.

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[4]Mr. Simms scored 1,866 out of 2,000, whereas Mr. Valley scored 1,835 out of 2,000, a 1.55% difference.

Mr. Simms also argues that defendant based the decision not to promote him on subjective criteria. He claims that the fact that he scored higher than Mr. Valley in the first round of interviews is sufficient to show that factors other than supervisory experience were involved in and led to DMHSAS's promotion decision. We disagree. As mentioned earlier, even though plaintiff had the highest score after the initial round of interviews, the small difference between Mr. Simms' and Mr. Valley's scores is insufficient to indicate illegitimate factors came into play in the second round of interviews. *Cf. Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1458 (10th Cir. 1994) (finding employer's selection of a younger employee who had a college degree for a position over an older employee who had a higher departmental ranking but no degree created no reasonable inference of pretext in an age discrimination suit where the stated reason for hiring the younger employee was his degree). Mr. Simms places great weight on the fact that he had greater education and training as a fireman, which he claims made him ore objectively qualified for the job. However, an employee's "own opinions about his ... qualifications [do not] give rise to a material factual dispute." *Rabinovitz v. Pena*, 89 F.3d 482, 487 (7th Cir. 1996). While Mr. Simms may have had the edge in education and fire training, Mr. Valley had substantially greater supervisory experience. When two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is clearly better qualified, "it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." *Colon-Sanchez v. Marsh*, 733 F.3d 78, 82 & n.1 (10th Cir. 1984); *accord Lujan v. Walters*, 813 F.2d 1051, 1057-58 (10th Cir. 1987).

In *Colon-Sanchez*, the first candidate had greater administrative and supervisory skills while the second had greater mechanical skills. Since the job description at issue discussed significant administrative and supervisory

responsibilities, we held that the employer's decision to hire the first candidate based on his administrative background raised no question of pretext. *See Colon-Sanchez*, 733 F.2d at 82. Similarly, DMHSAS's decision to hire Mr. Valley based on his supervisory experience is not the kind of subjective decision that, by itself, suggests pretext. *See Beaird*, 145 F.3d at 1169 (finding hiring decision based on employment performance grade over performance points, without more, "cannot reasonably be thought to evidence pretext"). Our role is to prevent unlawful hiring practices, not to act as a "super personnel department" that second guesses employers' business judgments. *Verniero v. Air Force Academy Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983); *see also, e.g., Rabinovitz*, 89 F.3d at 487.

Mr. Simms further asserts that defendant asked improperly subjective second round interview questions, thereby demonstrating pretext. However, he directs us to no questions that are unrelated to legitimate business considerations or blatantly subjective. Moreover, as we discussed above, he provides no evidence that he was so clearly better qualified than Mr. Valley that a jury could reasonably conclude that DMHSAS based its decision on something other than its proffered reason.

Mr. Simms also attempts to establish pretext by utilizing his employment history with DMHSAS to impute a discriminatory motive on the part of defendant. For example, Mr. Simms suggests that Stand LaBoon and Carol Kellison, who prevented him from immediately assuming his supervisory duties as Fire and Safety Officer II in 1994, somehow manipulated the entire supervisor selection process so that he would not receive the promotion. However, we can find nothing in this record to indicate that Mr. LaBoon and Ms. Kellison's involvement in the interview process was so irregular or inconsistent with the defendant's established policies as to make its hiring explanation unworthy of belief. To the contrary, their conduct is consistent with DMHSAS's

proffered nondiscriminatory reason for the promotion decision. While the fact that Mr. LaBoon and Ms. Kellison withheld Mr. Simms' supervisory duties is relevant, on this record, it is not enough to impute sinister motivations to them during the supervisor selection process.

Similarly, Mr. Simms attempts to establish pretext by reference to his prior settlement in Simms I, suggesting that because DMHSAS had settled a prior discrimination claim, its decision not to promote him to Fire and Safety Officer Supervisor was based on discriminatory motives rather than the reason proffered by defendant. Such a conclusive assertion is not probative of pretext unless the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand. *Cf. Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994) (holding that isolated comments in an ADEA case must be linked to challenged employment action in order to show discriminatory animus); *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526, 531 (10th Cir. 1994) (finding stray comments in ADEA case were insufficient to create triable issue of fact unless they were related to the challenged action). Mr. Simms fails to establish such a connection, for he does not link any of the parties involved in the current employment action, particularly Mr. LaBoon or Ms. Kellison, to the employment actions that were the subject of the Simms I litigation.

In addition, Mr. Simms attempts to establish pretext by alleging that he was disciplined for reading on the job, whereas white employees were not. That event occurred in April 1991, years before defendant made the promotion decision at issue in this case. Thus, it is also not sufficiently connected to the employment action in question to demonstrate pretext. *See Rea*, 29 F.3d at 1457; *Cone*, 14 F.3d at 531.

Finally, Mr. Simms makes much of the fact that the EEOC had issued a favorable letter of determination regarding his claim of race-based failure to promote, and that he had presented the letter to the district court. However, when the independent facts before the district court judge fail to establish a genuine issue of material fact, a favorable EEOC letter of determination does not create one. *But see Mitchell v. Office of Los Angeles County Superintendent of Schools*, 805 F.2d 844, 847 (9th Cir. 1986) (stating that "an EEOC finding of reasonable cause is 'sufficient at least to create an issue of fact' requiring proceedings beyond the summary judgment stage") (quoting *Gifford v. Atchison, Topeka, & Santa Fe Ry. Co.*, 685 F.2d 1149, 1156 (9th Cir. 1982)).

Even considering Mr. Simms' circumstantial evidence in its totality, as we must, *see Beaird*, 145 F.3d at 1174, plaintiff has provided insufficient evidence for a reasonable jury to conclude that defendant's proffered reason for not promoting Mr. Simms--that Mr. Valley was more qualified--was unworthy of belief. Consequently, plaintiff has failed to meet his burden of production and the district court appropriately granted summary judgment in favor of defendant on Mr. Simms' race discrimination claim.

Conclusion

For the reasons discussed above, we conclude that the district court did not err in granting summary judgment in favor of the defendant in either its September 3 or October 23 Order. AFFIRMED.

No. CIV-96-2158-A
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CEDRIC D. SIMMS,
Plaintiff,

v.

THE STATE OF OKLAHOMA ex rel., THE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES, a State Agency.
Defendant.

ORDER

Before the Court is the motion for partial summary judgment filed by defendant on June 16, 1997.[5] The Court is familiar with the parties in this case, as this is the second such case this year. In fact this is the third complaint filed by Mr. Simms against his former employer.

Plaintiff has filed three EEOC charges in the course of these proceedings: No. 311930053 (the 1992 charge), No. 311950136 (the 1994 charge), and No. 311950898 (the 1995 charge).

Plaintiff's first complaint against his then employer, the Department of Mental Health, was filed in 1993 and was

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[5]Plaintiff's original response to this motion, filed July 7, 1997, included a cross motion. Plaintiff then filed a second response on July 21, 1997. The second response withdrew the first response and "replaced" it. As the second response contained no reference to a cross motion, the cross motion is withdrawn and will not be considered by the Court.

settled by the parties. His second complaint (Simms II) was filed on January 12, 1996. The complaint in Simms III alleged continuing discrimination and retaliation. The allegations in the complaint were based upon the 1994 charge and the 1995 charge that plaintiff filed with the EEOC. The 1994 charge alleged racial discrimination that occurred on August 15, 1994. At the time the complaint in Simms II was filed, the plaintiff had not received a right-to-sue letter from the EEOC on that charge. By order dated Sept. 3, 1996, the Court dismissed the claims of discrimination and retaliation relating to the 1994 EEOC charge because plaintiff had not received a right-to-sue-letter. Other claims were decided by a jury on February 26, 1997.

Plaintiff received a right-to-sue-letter on the 1994 charge on October 2, 1996. On December 31, 1996, Plaintiff filed his third complaint (Simms III). This complaint, now pending before this Court, comprises four counts of discrimination and retaliation. Simms III includes allegations of retaliation similar to those dismissed in Simms II. Defendant argues for summary judgment on the claims of retaliation.

Summary Judgment Standard

Summary judgment is appropriate if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977).

In his response, plaintiff states that he "generally objects, denies and controverts in its entirety Defendant's

recitation of the facts." However, plaintiff's specific objections are not so much objections to the substance of defendant's version of the facts as a mere statement that the facts set out by defendant are not material.[6] Plaintiff goes on to set out his own version of undisputed material facts, and defendant has not objected to them. The Court concludes that there is no genuine issue of material fact, and thus the retaliation claims are a proper subject for summary judgment. Facts will be considered in the light most favorable to the non-moving party.

Exhaustion

A plaintiff must exhaust all administrative remedies before he may file a suit in federal court. *Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). This means that each claim set out in plaintiff's complaint must have been part of a previous EEOC charge for which plaintiff received a right-to-sue-letter. The exception to this rule is that claims reasonably related to the allegations of an EEOC charge may be included in the complaint. "When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC." *Brown v. Hartshorne Public School District*, 864 F.2d 680, 682 (10th Cir. 1988).

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[6]Plaintiff made one objection to the substance of defendant's facts. As Plaintiff notes, defendant's undisputed fact number 5 is a conclusion rather than a fact. However, the facts supporting number 5 are set out in supporting documents and appear to be undisputed.

Amendment of the 1994 Charge

On October 31, 1994, plaintiff filed the 1994 EEOC charge. Plaintiff checked the box on the form that indicated race discrimination. He did not check the box indicating retaliation as a claim. Plaintiff described the alleged discrimination in the box marked "THE PARTICULARS ARE," as follows:

I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe I have been discriminated against because of my race, Black, in Violation of Title VII of the Civil Rights Act of 1964, as amended.

On July 15, 1996, plaintiff amended the 1994 charge adding claims of retaliation and continuing action. Plaintiff described the alleged retaliation in the box marked "THE PARTICULARS ARE," as follows:

I. Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held (sic) from my Fire and Safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer supervisor.

II. The reasons given for withholding of supervisory duties and other disciplinary action, I believe were pretextual. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe that I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

The complaint in Simms III indicates that plaintiff believes the claims of retaliation are administratively exhausted by the amendment. A copy of the amended charge is attached to the complaint and is referred to specifically in paragraphs 22 and 32 of the complaint.

Each instance of retaliation described in the amendment occurred more than 300 days before July 15, 1996, the date when the amendment was filed. Three hundred days is the longest period of time that may elapse before the timely filing of an EEOC charge. 29 C.F.R. § 1601.13. Plaintiff apparently intended that the retaliation in the amendment to the charge relate back to the discrimination charged in the 1994 charge and thus avoid the statute of limitations.

Amendment of an EEOC charge is permitted "to cure technical defects or omissions ... or to clarify and amplify allegations made therein. such amendments and amendments alleging unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first

received." 29 C.F.R. § 1601.12. For the July 15, 1995 amendment to relate back to the original date of filing, it would have to either be a clarification or amplification of the original charge, or to related to or growing out of the original charge.

EEOC charges will be liberally construed in recognition of the fact that they are drafted by laymen. a liberal construction of the original 1994 filing does not yield any indication of retaliation as a claim. Thus, the amendment cannot be a clarification or amplification of the original claim. Because the alleged retaliation in the amendment occurs contemporaneously (failure to promote) or earlier in time than the alleged race discrimination in the original 1994 charge, it is impossible for the amendment to be related to or growing out of the subject matter of the original charge. The Court finds that the amendment does not relate back. The Court finds that the July 15, 1996 amendment of the 1994 charge was improper. Plaintiff may not add claims out of time simply by titling them "amendment." The retaliation claims in Simms III are not administratively exhausted because they have not been the subject of a valid EEOC charge.

Reasonably Related

Plaintiff argues that his retaliation claims are properly before the Court because they are reasonably related to EEOC charges. Plaintiff appears to argue alternatively that they are related to the 1994 charge and the 1992 charge. To determine whether they are reasonably related, the Court will address the substance of the retaliation claims alleged in Simms III. Counts I and II allege retaliation.

Count I lists what plaintiff characterizes as "continuing" violations. They consist of a number of policy decisions made by agents of defendant in 1994. Each instance listed occurs before August 14, 1994, the date of the

discrimination alleged in the 1994 EEOC charge. Paragraph 28, subparagraphs l-m, of the complaint list instances of alleged retaliation that occurred in 1995.[7] The parties do not specifically address the 1995 allegations of retaliation, so the Court assumes they are not part of the motion for partial summary judgment.

Plaintiff argues that the retaliation was continuing so that in part it is later in time than the alleged discrimination. The "continuing" violations were the continuing enforcement or implementation of policies that were enacted prior to August 14, 1994. "[W]here a retaliatory act occurs prior to the filing of a charge and the employee fails to allege the retaliatory act or a retaliation claim in the subsequent charge, the retaliatory act ordinarily will not reasonably relate to the charge." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997). Acts occurring earlier in time than the alleged discrimination cannot be reasonably related to the discrimination.

Count II alleges failure to promote, which is the exact substance of the discrimination claim in the 1994 EEOC charge. The rule described in *Seymore* indicates that reasonably related means that the retaliatory action is in retaliation for filing the EEOC charge. In this case, if the motive for failing to promote was both race discrimination and retaliation, then the retaliation would have to be related to earlier protected activity. The Court finds that the retaliation alleged Count I and Count II of Simms III is not reasonably related to the 1994 EEOC charge.

In his response to the motion for partial summary judgment, plaintiff argues that the retaliation charges

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[7]The Court was astonished to find that these instances are the claims of retaliation already presented to the jury in Simms II. Defendant has not raised the defense of estoppel to these claims.

reasonably relate to the 1992 charge. Plaintiff's brief constantly stresses the word "original" in citing the rule that acts reasonably related to the original charge need not be included in an EEOC charge. Plaintiff reads this to mean that anything reasonably related to the 1992 charge (plaintiff's first and therefore original charge) is properly before the Court.

In *Seymore, Id.*, the Court of Appeals made it clear that this rule allows acts that reasonably relate to a *pending* charge. *Id.* at 799-800. The 1992 charge is not pending as it was settled and administratively closed on April 22, 1994. If plaintiff was aware of the acts of alleged retaliation during the pendency of the 1992 charge, he could have included them in that action. Otherwise, the proper course would have been to file a timely EEOC charge alleging retaliation or to state of claim of retaliation in the 1994 charge. He failed to do so. Therefore, the claims of retaliation occurring before 1995 that are alleged in Counts I and II of Simms III are time barred.

Conclusion

The claims of retaliation occurring before 1995 in Counts I and II are not properly before the Court. Partial summary judgment is GRANTED to defendant as to claims alleged in paragraph 26, and paragraph 28, subparagraphs a-h of Count I, and Count II of the complaint. The claims set out in paragraph 27 and paragraph 28, subparagraphs i-m of Count I, and Counts III and IV remain.

/s/
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

No. 97-6366
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CEDRIC D. SIMMS,
Plaintiff-Appellant,

v.

STATE OF OKLAHOMA, etc.,
Defendant-Appellee

ORDER
Filed February 24, 1999

Before TACHA, BRISCOE, and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Opal A. Carter
Deputy Clerk

ADDITIONAL STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath

or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect the charge.

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-12(a). Regulations

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.

EEOC CHARGE FILED OCTOBER 31, 1994

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
☐ FEPA ☒ EEOC	311950136

Oklahoma Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Mr. Cedric D. Simms	(405) 329-6836

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
1303-B 12TH AVE. NE, NORMAN, OK 73071		11/22/66

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
GRIFFIN MEMORIAL HOSPITAL	Cat A (15-100)	(405) 321-4880

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
900 E. MAIN, NORMAN, OK 73071		027

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
08/15/94	08/15/94

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

EXHIBIT
D

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date 10-31-94 Cedric Simms
Charging Party *(Signature)*

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
Cedric Simms

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year) 10/31/94

000020

EEOC FORM 5 (Rev. 06/92)

BEST AVAILABLE COPY

EEOC CHARGE FILED JULY 15, 1996

CHA. OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement - ore completing this form.

AGENCY	CHARGE NUMBER
☐ FEPA ☒ EEOC	AMENDED 311950136

Oklahoma Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Mr. Cedric D. Simms	(405) 329-6836

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
1303-B 12TH AVE. NE,	Norman, OK 73071	11/22/66

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
GRIFFIN MEMORIAL HOSP		(405) 321-4880

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
900 E. MAIN,	Norman, OK 73071	027

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE
EARLIEST 05/01/94 *LATEST* 09/22/95
☒ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I.

Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held from my Fire and Safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II.

The reasons given for withholding of supervisory duties and other disciplinary actions, I believe were pretextural. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected

EXHIBIT 5

III.

I believe that I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

This charge has been amended to include retaliation, and the continuing violation.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date Charging Party *(Signature)*

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
X Cedric Simms

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)
15 July 1996 George R Garrett

EEOC FORM 5 (Rev. 06/92)

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JUN 22 1999
CLERK

No. 98-1884

In The

Supreme Court of the United States

CEDRIC D. SIMMS,

Petitioner,

v.

THE STATE OF OKLAHOMA, *ex rel.*,
THE DEPARTMENT OF MENTAL HEALTH
AND SUBSTANCE ABUSE SERVICES,
A STATE AGENCY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS AND JUDGMENT BELOW

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Simms v. State of Oklahoma, ex rel., Department of Mental Health and Substance Abuse Services, Case No. CIV-96-2158-A, United States, District Court, Western District of Oklahoma, Judgment entered on September 3, 1997.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* 29 CFR § 1601.12(b):

> Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date. However, an amendment alleging additional acts constituting unlawful employment practices not directly related to or growing out of the subject matter of the original charge will be permitted only where at the date of the amendment the allegation

could have been timely filed as a separate charge.

STATEMENT OF THE CASE

Petitioner, Cedric Simms, began working for Respondent, the Department of Mental Health and Substance Abuse Services, a state agency, on April 29, 1991. Petitioner's Petition p. 2a. On October 12, 1992, after being denied a promotion, Petitioner filed a Charge of Discrimination, Charge No. 311930053 ("Charge I") alleging he had been discriminated against because of his race. *Id.* On December 21, 1993 he filed a Title VII lawsuit (*"Simms I"*) in the United States District Court, Western District of Oklahoma. On April 13, 1994, a settlement was reached, wherein Petitioner was promoted to the position of Fire & Safety Officer II with Griffin Memorial Hospital, Norman, Oklahoma. He began his supervisory duties June 20, 1994. *Id.*

Ten days later, on June 30, 1994, Respondent posted a job announcement for the position of Fire and Safety Officer Supervisor. *Id.* The posting stated *"PREFERENCE WILL BE GIVEN TO APPLICANTS WITH SUPERVISORY EXPERIENCE."* *Id.* Petitioner applied for the position. *Id.* He and another candidate, a white male, were selected as the top two candidates after a first round of interviews. *Id.* Petitioner had a score of 1,866 out of 2,000, and the white male had a score of 1,835 out of 2,000, a 1.55% difference. *Id.* at 12a, n.4. A second interview was held to make the final selection and on August 15, 1994 the white male candidate, who had greater supervisory experience,

was chosen. *Id.* at 2a. Because he was not selected, on October 31, 1994, Petitioner filed a second Charge of Discrimination, Charge No. 311950136 ("Charge II") alleging he was discriminated against because of his race. In the section of the charge reading "The Particulars Are," Petitioner stated:

> I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.
>
> II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.
>
> III. I believe I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

Id. at 29a.

In the section of Charge II reading "Date Discrimination Took Place," Petitioner listed August 15, 1994 as the "earliest" and "latest" date. *Id.* In the section reading "Cause of Discrimination Based On," Petitioner checked the box identified as "Race." *Id.* Petitioner did not check the box identified as "Retaliation" or allege any facts that would give rise to an inference that retaliation had taken place. *Id.* No mention of the previous EEOC charge or any other allegedly wrongful acts were made. *Id.*

On June 5, 1995, Petitioner filed a third charge of discrimination, Charge No. 311950898, ("Charge III"), contending various work-related disciplines imposed upon him were retaliation for having filed Charge II. *Id.*

at 3a. A right-to-sue letter on Charge III was issued by the Equal Employment Opportunity Commission ("EEOC") on November 29, 1995. *Id.* He brought a Title VII action in the federal district court of the Western District of Oklahoma on January 12, 1996, alleging race-based employment discrimination and retaliation, including allegations of retaliatory acts occurring prior to 1995 that were not covered by Charge III (*"Simms II"*). *Id.* At the time the suit was brought, he had not yet received a right to sue letter on Charge II. *Id.* On July 13, 1996, Respondent filed a motion for partial summary judgment in *Simms II* on the grounds Petitioner had failed to exhaust his administrative remedies as to the race discrimination and pre-1995 retaliation claims. *Id.*

Two days later, on July 15, 1996, Petitioner filed an amendment to Charge II, alleging pre-1995 acts of retaliation. In the section of the charge reading, "The Particulars Are," Petitioner stated:

> I. Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held from my fire and safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.
>
> II. The reasons given for withholding of supervisory duties and other disciplinary acts, I believe were pretextural. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services)

> informed me by written notice that a better experienced candidate had been selected.
>
> III. I believe I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

This charge has been amended to include retaliation, and the continuing violation. *Id.* at 31a.

In the section reading "Date Discrimination Took Place," Petitioner listed May 5, 1994 as the "earliest" and September 22, 1995 as the "latest" date. *Id.* Petitioner checked the boxes identified as "Retaliation" and "Race." *Id.*

On September 3, 1996, the district court in *Simms II* granted Respondent's motion for partial summary judgment leaving only the post-1995 retaliation claims for trial. *Id.* at 3a-4a. On September 25, 1996, the EEOC issued a right to sue on Charge II, and Petitioner filed this suit ("*Simms III*"). *Id.* at 4a. On January 6, 1997, Petitioner filed a motion to consolidate *Simms II* and *Simms III*. *Id.* The motion to consolidate was denied because at the time it was filed, *Simms II* was scheduled to begin jury trial in a week. *Id.*

On June 16, 1997, Respondent filed a motion for summary judgment in *Simms III* claiming Petitioner's pre-1995 retaliation claims were time-barred and did not relate back to Charge II, the underlying EEOC charge. *Id.* On September 3, 1997, the district court found Petitioner's amendment was neither timely or related to the

activities contained in Charge II. *Id.* The Order was appealed to the Tenth Circuit which, in a published opinion, held Petitioner had failed to exhaust his administrative remedies regarding the retaliation claims. *Id.* at 16a. Thereafter, it denied Petitioner's request for rehearing, leading to this Petition for Certiorari.

SUMMARY OF THE ARGUMENT

The issues raised in this appeal touch on a very narrow issue that does not warrant the perusal of the United States Supreme Court. In Petitioner's Petition for Certiorari, Petitioners couch the Question Presented in terms far too broad for the facts of the case presented, as follows:

> Does an amendment to an EEOC charge of discrimination relate back to the date of the original charge of the purpose of complying with the statute of limitations for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, where the amendment alleges an additional "legal theory" that grows out of the same set of operative facts that were in the original charge?

This case, with its odd fact pattern, turned on far more narrow grounds that do not give rise to the weighty considerations espoused by Petitioner. The only pertinent issue arising from this case for this court to consider is:

> Does an amendment to an EEOC charge of discrimination adding a new legal theory of retaliation based on facts that occurred prior to filing the original charge relate back to the date of the

> original charge of the purpose of complying with the statute of limitation for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, ***when the original charge makes no reference to any facts that would demonstrate pre-filing retaliation, and when the EEOC complaint from which retaliation allegedly flowed is not before the Court?***

Due to the unique facts in this case, Petitioner has relied upon cases that are not on point and cannot be used to demonstrate a split in the Circuits.

Further, a careful reading of the Tenth Circuit Opinion does not support Petitioner's claim it has adopted a hyper-technical rule that erects improper procedural roadblocks which will compromise the purposes of Title VII. Because the Tenth Circuit examined what was alleged in Petitioner's original charge to determine whether the amendment reasonably related back to the date of the filing, it cannot be said its holding espouses a hyper-technical rule that will impermissibly undermine the laudable goals of Title VII. Further, Petitioner has provided this Court no caselaw interpreting the unique fact pattern of this case that contradicts the analysis of the Tenth Circuit or evidences a split in the Circuits.

ARGUMENT

I. AMENDMENTS MAY RELATE BACK TO THE ORIGINAL DATE OF FILING IF THEY RELATE TO OR GROW OUT OF THE SUBJECT MATTER OF THE ORIGINAL CHARGE.

Petitioner's claim he was disciplined in retaliation for having filed an EEOC charge in 1992 was dismissed because he failed to exhaust his administrative remedies. It is well settled that in order for federal courts to have subject matter jurisdiction of Title VII claims, the claimant must first unsuccessfully pursue administrative relief. *See* 42 U.S.C. § 2000e-5(e) and (f)(1) (1994); *See Love v. Pullman Co.*, 404 U.S. 522, 30 L.Ed.2d 679, 92 S.Ct. 616 (1972); *Rush v. McDonald's Corporation*, 966 F.2d 1104, 1110, n.20 (7th Cir. 1992); *Trevino-Barton v. Pittsburgh Nat. Bank*, 919 F.2d 874, 878 (3rd Cir. 1990).

Once a charge is made and a right to sue letter is issued, a plaintiff may bring suit in federal court. The scope of the complaint is limited to charges set forth in the EEOC charge. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974). *Rush*, 966 F.2d at 1110 n.20; *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Hill v. Western Electric Co.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982) (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)), *cert. denied*, 459 U.S. 981 (1982); *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 446 (6th Cir. 1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 506 (1978) (The judicial complaint must be limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination; *See also Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 127

(7th Cir. 1989); *EEOC v. General Electric Co.*, 532 F.2d 359, 373 (4th Cir. 1976).

Although the rule is not jurisdictional, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982), it is a condition precedent with which Title VII plaintiffs must comply. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863-64 (7th Cir. 1985). Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. *Cheek v. Western and Southern Life Insurance Co.*, 31 F.3d 497, 500 (7th Cir. 1994).

When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC. *See Oubichion v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973) (citing to *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971); *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971); *Sanchez*, 431 F.2d at 465-67; cf. *Macklin v. Spector Freight Systems, Inc.*, 156 U.S.App. D.C. 69, 478 F.2d 979 (D.C. Cir. 1973)) (emphasis added); *See also Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124 (7th Cir. 1989); *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976); *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 403 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968); *Oatis v. Crown Zellerbach*

Corp., 398 F.2d 496, 497-498 (5th Cir. 1968). *See, e.g., Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 464 (5th Cir. 1983), *cert. denied*, 429 U.S. 986, 107 S.Ct. 102, 78 l.Ed.2d 106 (1983); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981); *Kirkland v. Buffalo Bd. Of Educ.*, 622 F.2d 1066, 1068 (2nd Cir. 1980); *Satz v. ITT Fin. Corp.*, 619 F.2d 738, 741 (8th Cir. 1980).

In Charge II, the underlying charge, Petitioner alleged only that he had been discriminated against on the basis of race. Petitioner's amendment included a new theory of retaliation and pre-filing acts he alleged were done in retaliation for filing Charge I. Proper amendments must meet the standards set forth in 29 CFR § 1601.12(b), which states as follows:

> Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date. However, an amendment alleging additional acts constituting unlawful employment practices not directly related to or growing out of the subject matter of the original charge will be permitted only where at the date of the amendment the allegation could have been timely filed as a separate charge.

The Tenth Circuit found the amendment did not reasonably relate to the original charge. Petitioner attempts to persuade this Court he was denied the right to bring

his retaliation claims because the Tenth Circuit took an overly narrow view of the EEOC regulation. This argument is without merit. An objective look at the facts of the case reveals he simply failed to set forth information in his original charge upon which to base a retaliation claim. The Tenth Circuit opinion turned on this issue rather than on a "hyper-technical" interpretation of 29 CFR § 1601.12(b).

II. THIS CASE CONCERNS A VERY NARROW ISSUE THAT DOES NOT WARRANT SCRUTINY OF THE UNITED STATES SUPREME COURT

Petitioners couch the Question Presented in terms far too broad for the facts of the case presented, as follows:

> Does an amendment to an EEOC charge of discrimination relate back to the date of the original charge of the purpose of complying with the statute of limitations for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, where the amendment alleges an additional "legal theory" that grows out of the same set of operative facts that were in the original charge?

This case turned on a far more narrow issue that does not give rise to the weighty considerations espoused by Petitioner. The only pertinent issue arising from this case was:

> Does an amendment to an EEOC charge of discrimination adding a new legal theory of retaliation based on facts that occurred prior to filing the original charge, relate back to the date of the original charge of the purpose of complying

with the statute of limitation for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, ***when the original charge makes no reference to any facts that would demonstrate pre-filing retaliation, and when the EEOC charge from which retaliation allegedly flowed, is not before the Court?***

The bulk of Petitioner's Petition is based on his claim the Circuits are split on the issue of what standard to apply in determining whether amendments relate back to the date of the original charge. However, retaliation charges are comprised of fundamentally different elements than are discrimination claims, and only a comparison of similar cases is helpful in making such observation.

Actionable retaliation, by its very nature, is an act taken in reaction to the protected conduct of a plaintiff. *McKenzie v. Illinois Dept. of Trans.*, 93 F.3d 473 (7th Cir. 1996). Unless a plaintiff indicates in the original charge that he engaged in some protected conduct that led to the defendant's alleged retaliatory acts, there arises no reasonable inference that retaliation has taken place. Further, even a layperson would have no difficulty explaining this in plain language, *i.e.*, "I was fired because I filed an EEOC charge."

Petitioner makes no claim there is a dispute among the Circuits as to whether post-filing claims of retaliation relate back to the original date of filing, and indeed, the Circuits appear to be in agreement a plaintiff need not file additional charges for retaliatory acts that occur *after* the original charge is filed. *See Bouman v. Block*, 940 F.2d 1211

(9th Cir. 1991) (holding that retaliation claim was "reasonably related" to prior sex discrimination claim), *cert. denied*, 502 U.S. 1005, 116 L.Ed.2d 658, 112 S.Ct. 640 (1991); *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990) (reasoning that because other Title VII claims were properly before court, jurisdiction existed over retaliatory termination claim as well), *cert. denied*, 501 U.S. 1260, 115 L.Ed.2d 1079, 111 S.Ct. 2916 (1991); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167 (11th Cir. 1988); *Kirkland v. Buffalo Bd. Of Educ.*, 622 F.2d 1066 (2nd Cir. 1980) (holding that act of retaliation was "directly related" to plaintiff's initiation of litigation); *But see Waiters v. Parsons*, 729 F.2d 233, 237 n.10 (3rd Cir. 1984) (declining to adopt a "*per se* rule").

This position makes sense. As stated by the Court in *McKenzie v. Illinois Dept. of Trans.*, 92 F.3d 473 (7th Cir. 1996):

> It is the nature of retaliation claims that they arise after the filing of the EEOC charge. Requiring prior resort to the EEOC would mean that two charges would have to be filed in a retaliation case – a double filing that would serve no purpose except to create additional procedural technicalities when a single filing would compete with the intent of Title VII. We are reluctant to erect a needless procedural barrier to the private claimant under Title VII, especially since the EEOC relies largely upon the private lawsuit to obtain the goals of Title VII. Intertwined with the practical reason for our holding is a strong policy justification. Eliminating this needless procedural barrier will deter employers from

> attempting to discourage employees from exercising their rights under Title VII. (Citations omitted). *Id.* at 482.

The Circuits have had no difficulty finding retaliatory acts that occur after the original charge is filed relate back to the date of the original filing, including the Tenth Circuit. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 11 S.Ct. 342 (1997); *Brown v. Hartshorne Public Sch. Dist. No. 1*, 864 F.2d 680 (10th Cir. 1988) (holding that retaliation arising out of first EEOC filing was "reasonably related" to that filing, obviating the need for a second EEOC charge). These cases addressing retaliation charges directly contradict Petitioner's claim the Tenth Circuit has a rigid approach to allowing the relation back of amendments to the date of the original charge.

However, in all the cases listed that held the amendment related back, the alleged retaliatory acts occurred as a result of filing the ***underlying*** EEOC charge. In other words, the alleged retaliatory acts took place after the filing of the underlying charge and during its pendency. The sticking point in this case is that the alleged retaliatory acts did ***not*** occur as a result of the filing of the underlying charge or during its pendency. Instead, in his amendment, Petitioner tried to add a claim of retaliation based on facts that allegedly occurred before he filed the underlying charge, notwithstanding that he did not so much as hint at them in Charge II. The Circuits that have faced this issue have not been willing to find such acts to be reasonably related to the original charge, and Petitioner has pointed to *no* cases in support of such proposition, much less a split in the Circuits.

For example, in *Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2nd Cir. 1993), the plaintiff asked the Second Circuit to rule all retaliation claims are *per se* reasonably related. The court declined the plaintiff's request. The court noted "the reasonable related rule has been broadly construed to allow judicial redress for most retaliatory acts arising *subsequent* to an [Equal Employment Opportunity Commission] filing." *Id.* at 1209 (emphasis added). In order to be reasonably related to the Equal Employment Opportunity Commission complaint, the court stated "the rule is that a claim must arise only *after* the . . . complaint has been filed." *Id.* (emphasis added).

Likewise, in *Ang v. The Proctor and Gamble Co.*, 932 F.2d 540 (6th Cir. 1991), the plaintiff alleged Proctor and Gamble fired him in retaliation for his demand that they study the differential treatment of minority Ph.D.'s at the company. The conduct occurred prior to the filing of the EEOC charges and thus could have been alleged in the original charge. The Sixth Circuit held that retaliatory conduct occurring *prior* to the filing of the EEOC complaint is distinguishable from conduct occurring afterwards and that it did not meet the criteria to relate back. *Id.* at 546. The amendment was not allowed.

In *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 545 n.2 (7th Cir. 1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989), the plaintiff brought claims based on age discrimination and retaliation. The Seventh Circuit acknowledged a number of cases have allowed retaliatory discharge claims to proceed even though the underlying charge did not mention retaliation. However, it recognized retaliation that allegedly occurred *prior* to the filing of the original charge was an entirely different situation.

In discussing post-filing retaliation claims, the Seventh Circuit held:

> These cases are distinguishable from the present case where the alleged retaliatory acts occurred before Steffen's December 1, 1983 charge of discrimination was filed and Meridian was not given clear notice that retaliation was at issue. *Id.* at 545 n.2 (emphasis added).

See also O'Rourke v. Continental Casualty Co., 983 F.2d 94 (7th Cir. 1993) (pre-filing retaliatory acts not alleged in the original charge disallowed).

In *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794 (10th Cir. 1997), the Tenth Circuit articulated a well reasoned position concerning whether alleged retaliatory acts that took place prior to the original charge, but were not mentioned, may relate back to the original date via an amendment. In *Seymore*, the plaintiff filed a complaint alleging race and sex discrimination with the Oklahoma Human Rights Commission prior to her termination. She then filed a separate charge with the EEOC five days after she was terminated. The Court held Ms. Seymore was aware of her retaliation claim at that time, and had the opportunity to assert that claim on her EEOC charge, thus giving defendants notice of the claim and providing the EEOC the opportunity to attempt to conciliate the claim. Because the complaint was filed after her termination, the Court held the defendants, as well as the EEOC, were entitled to presume Ms. Seymore was only asserting claims for race and sex discrimination. The Court addressed the policy issues involved in such a factual situation. It held:

> If we were to allow Ms. Seymore to rely on her earlier Human Rights' Commission complaint to assert a claim or retaliation, we would be acting in blatant disregard of the dual purposes of the Equal Employment Opportunity Commission charge requirement. *Id.* at 800.

Due to the unique facts in this case, Petitioner has relied upon cases that are not on point and cannot be used to demonstrate a split in the Circuits.

III. PETITIONER HAS POINTED TO NO PERTINENT CASE LAW SUGGESTING A SPLIT IN THE CIRCUITS INVOLVING THE ISSUE OF WHETHER AMENDMENTS ALLEGING RETALIATION BASED ON EVENTS THAT TOOK PLACE PRIOR TO THE FILING OF THE ORIGINAL CHARGE RELATE BACK TO THE DATE OF THE ORIGINAL FILING

Petitioner claims the Circuits are split on the issue of what standard to apply in determining if amendments relate back to the original filing. He claims his Petition for writ of certiorari should be granted because the decision below "directly and irreconcilably conflicts with the rulings of several other Circuits as well as the applicable decisions of this Court." Petitioner's Petition p. 8. He claims the Tenth, Fourth and Ninth Circuits have concluded an amendment will not relate back if it advances a new theory of recovery regardless of what facts were included in the original charge, citing to this case; *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996); and *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988). In contrast, Petitioner claims the Third, Fifth, Sixth and Eighth Circuits have taken a

more flexible approach to the regulation and have held the language of the regulation allows amendments based on different legal theories that derive from the same set of operative facts included in the original charge. The cases relied upon by Petitioner are factually different from this case, rendering them inapplicable.

In both the *Evans* and *Pejic* cases, the courts refused to allow amendments alleging new legal theories to relate back to the time of the original filings. In *Evans*, the plaintiff attempted to add a sex discrimination claim to the original charge of age discrimination. In *Pejic*, the plaintiff attempted to add an age discrimination claim to the original charge of discrimination based on national origin. In essence, both courts held that because the different legal theories arose from different statutory schemes they did not relate back to the original charge. "Title VII and ADEA claims arise from entirely different statutory schemes." *Pejic*, 840 F.2d at 675. *See also Evans*, 80 F.3d at 963.

These cases need not stand for the proposition that the courts need only look to the original legal theory alleged in the underlying charge. Clearly, the courts looked to the substance and facts provided in the original charge in determining whether the amendment related back to the date of the original filing, the result, notwithstanding. There is nothing to suggest in either of these cases that the courts would have hesitated to allow the amendments had there been a factual hint in the original filings that other legal theories were a possibility. As stated previously, defendants are entitled to notice.

The other cases cited by Petitioner are also not on point. In *Hicks v. ABT Associates*, 572 F.2d 960 (3rd Cir. 1978), the Court reversed a summary judgment because there was a question of material fact as to whether the EEOC had improperly refused to allow the plaintiff to amend his complaint to add sex discrimination during the statutory period allowed b statute. *Zanders v. O'Gara-Hess*, 952 F.2d 404 (6th Cir. 1992), 1992 U.S. App. Lexis 535 should not be relied upon because it is not a published opinion. In *Anderson v. Block*, 807 F.2d 145 (8th Cir. 1986) the Court addressed an amendment related to *post filing* conduct. The Court held, "In addition, while the length of time during which a plaintiff may bring suit based on *post filing* conduct will be limited only by the promptness with which administrative proceedings on the initial charges are concluded, we see no unfairness in thus preserving the right to a judicial determination throughout the period during which the post charge incident could be subject to administrative investigation and resolution." *Id.* at 148. (emphasis added). Because this case does not concern post filing conduct, *Anderson* is not on point.

In *Hornsby v. Conoco, Inc.*, 777 F.2d 243 (5th Cir. 1985), the plaintiff clearly wrote in the factual circumstances related to sex discrimination so that amending the charge later was not troublesome. In that case, the plaintiff checked the box marked "other" and wrote in "age and retaliation." In the body of her statement she wrote she had told a supervisor that unless she was promoted, she would go to the EEOC because she felt she was being discriminated against because of her sex. *Id.* at 244. In contrast, in this case Petitioner set forth no factual basis

to support the retaliation claim based on pre-filing conduct.

In *Washington v. Kroger Co.*, 671 F.2d 1072 (8th Cir. 1982), the Court allowed a second charge to serve as an amendment of the first, but the substance of the second charge was based on acts that occurred *after* the filing of the first charge and were also alleged in the first charge. The Court stated:

> But plaintiff's claim of denial of opportunity to perform "checker" duties appears in her original charge filed with the EEOC . . . reappears in the complaint filed three and a half months later with the Missouri Department of Human Relations, . . . and is also contained in the second charge of discrimination filed with the EEOC on July 6, 1973. . . . This claim alleges facts that suggest a violation of Title VII continuing at least until the date plaintiff filed her complaint with the Department of Human Relations." *Id.* at 1075-76.

In contrast, Petitioner did not set forth a factual basis for the retaliation claim, nor did he suggest in his Petition how the facts in his original charge were broad enough to include the retaliation claims.

In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 458 (5th Cir. 1970), the plaintiff originally checked "sex" to indicate what form of discrimination she was alleging. She included a number of facts including being struck by her supervisor, and not being paid when she injured her thumb at work. *Id.* at 458. Later, she amended the charge to include facts amplifying the original description, and alleged both sex discrimination and discrimination based on national origin. *Id.* at 459. The Court held the factual

statements were sufficiently broad enough to support a charge of discrimination based on national origin and allowed the charge to be amended. *Sanchez* is easily distinguished from this case. In addition to not including retaliation as the proper legal theory, Petitioner failed to include any essential factual details that would give a reasonable EEOC investigator and the plaintiff's employer notice that retaliation was included in the charge. Retaliation is not synonymous with discrimination.

Petitioner also relies upon two district court cases, *Conroy v. Boston Edison Co.*, 758 F.Supp. 54 (D. Mass. 1991) and *Adames v. Mitsubishi Bank, Ltd.*, 751 F.Supp. 1565 (E.D.N.Y. 1990), to support his position. It is interesting that Petitioner would rely upon *Conroy* because in that case, the Court refused to allow the plaintiff to amend her original charge of sex discrimination to include age discrimination. The Court adopted the reasoning found in *Pejic*, 840 F.2d 667 (9th Cir. 1988) and held the plaintiff's amendment did not clarify or amplify the earlier charge of sex discrimination. *Id.* at 59. Further, the Court held that a reasonable investigation of sex discrimination would have focused upon whether plaintiff was discharged on account of her sex rather than her age. *Id.*

Likewise, a reasonable investigation of Petitioner's original charge would have looked to see if he had been denied a promotion because of his race. Nothing in the original charge would have alerted a reasonable investigator to go back in time to determine whether there had been previous EEOC filings that could possibly reveal a retaliatory motive for the failure to promote. Under Petitioner's theory, an investigator could look back in time

over a period of decades searching the history of the parties to determine if the Petitioner had *ever* engaged in protected activity. If any were found, even though it was not mentioned in the filing, the Petitioner would be allowed to amend the charge to include retaliation. Petitioner points to no caselaw and offers no argument to support such an unfair and absurd proposition.

Petitioner claims "the rule adopted by the Tenth Circuit undermines the administrative scheme adopted by Congress [to place the charged party on notice of alleged violations and to give the EEOC sufficient information to investigate, and to provide the parties an opportunity to conciliate]" Petitioner's Petition p. 16. However, Respondent asserts allowing amendments to encompass acts and theories that took place prior to the original filings serves to undermine these very goals.

The Court should consider the amendment was not even filed until after Respondent filed a motion for partial summary judgment. Petitioner's Petition p. 3a. The amendment in question was filed long after Petitioner had obtained counsel. The Court should discourage the use of amendments as mere trial tactics to avoid the statutory constraints of the statute. *See e.g. Conroy*, 758 F.Supp. at 58 (Courts have looked at the timing of the amendment, and have said that where the filing of the amendment closely precedes the filing of the federal court action, it is likely an attempt to avoid the filing requirements) (cites omitted)).

The *Adames* case is also not on point. In *Adames*, the plaintiff originally alleged sex and national origin discrimination. She later attempted to amend the charge to

include a class-wide discrimination claim based on race and color. *Adames*, 751 F.Supp. at 1568. The Court found the original filing did not put the defendants on notice and that the amendment covered a much more extensive time frame than did the original filing. Accordingly, the amendment was not allowed. *Id.*

Likewise, Petitioner's amendment is far broader than was the original charge, and did not reasonably serve to place Respondent on notice of additional issues. The original charge was limited to race discrimination for failure to promote. In contrast, the proposed amendment attempted to add "withholding of supervisory duties" and retaliation for "filing previous charges, and for objecting to unlawful practices." The original charge was based on the events of one day, August 15, 1994. The amendment expended this time frame from the earliest date May 1, 1994 to the latest date September 22, 1995. Petitioner's Petition p. 31a. Allowing such amendment would have been improper.

In claiming the Circuits are split because they have selected different legal standards to determine whether amendments relate back to the original charge, Petitioner attempts to prove too much. Such a conclusion can not be drawn without comparing the factual circumstances of the relevant opinions. As set forth herein, a review of the relevant Circuit opinions indicates they regularly find amendments alleging retaliatory acts that take place ***post-filing*** relate back to the original charge. However, they are not likely to hold that amendments setting forth alleged retaliatory acts that took place ***prior*** to filing the original charge relate back.

Petitioner has made broad sweeping claims that the Tenth, Fourth and Ninth Circuits have unduly restrictive rules on relation back of amendments. Yet all three of these Circuits have adopted rules allowing retaliation claims arising during the pendency of the underlying claim to be part of a subsequent lawsuit. *See Bouman*, 40 F.2d 1211 (9th Cir. 1991), *cert. denied*, 502 U.S. 1005, 116 L.Ed.2d 658, 112 S.Ct. 640 (holding that retaliation claim was "reasonably related" to prior sex discrimination claim); *Chisholm*, 665 F.2d 482, 491 (4th Cir. 1981); *Seymore*, 111 F.3d 794 (10th Cir. 1997). These cases aptly demonstrate the analysis contained in Petitioner's Petition is flawed because it does not address issues on point to this case.

In addition, Petitioner has claimed on page 14 of his Petition that " . . . [h]ad the petitioner been in one of the Circuits allowing amendment alleging additional legal claims to relate back when the amendment flows from the same facts as in the original charge, he would have had the opportunity to present his retaliation claims to a jury." Presumably Petitioner is referring to the Third, Fifth, Sixth and Eighth Circuits which he alleges have a flexible approach to the relation back doctrine. *See* Petitioner's Petition p. 11. Yet in *Ang v. The Proctor and Gamble Co*, 932 F.2d 540 (6th Cir. 1991), a case with a fact pattern similar to this case, the Sixth Circuit rendered the same decision as did the Tenth Circuit. Because the Third, Fifth and Seventh Circuits have not published conflicting opinions on point, no conclusion can be drawn as to whether there is diversity among the Circuits. Because these types of cases are so fact-driven, Petitioner could not show a

split in the Circuits unless he limited discussion to cases that were factually similar. He has not done so.

IV. THE TENTH CIRCUIT DID NOT ADOPT A "HYPER-TECHNICAL" RULE INTERPRETING 29 CFR § 1601.12(b).

Petitioner claims the Tenth Circuit improperly affirmed the judgment of the district court by adopting a "hyper-technical" rule that turned on the legal theory alleged in the original filing. He claims:

> The Tenth Circuit's decision would allow amendments to relate back only if those amendments clarify legal theories already articulated in the original charge. (App 8a.) The result is a blanket rule prohibiting amendments alleging new legal claims even when those claims are 'related or grow [ ] out of the subject matter of the original charge. (App 6a).' Petitioner's Petition pp 9-10.

In support, he quotes from the Tenth Circuit Opinion as follows:

> . . . [W]e hold that Mr. Simms' retaliation charge does not relate back under § 1601.12(b) because his 1996 amendment alleges a new theory of recovery, retaliation, that he did not raise in the second EEOC charge.

Standing alone, this passage could possibly be interpreted as Petitioner has suggested. However, Respondent respectfully suggests these statements have been taken out of the proper context of the entire opinion. For example, Petitioner does not apprise the Court that in the very

next paragraph of the Opinion, the Court continues its analysis as follows:

> Even though Mr. Simms did not properly exhaust administrative remedies, ***our inquiry as to whether this court may hear the retaliation claims has not come to an end.*** This court has adopted a limited exception to the exhaustion rule for Title VII claims when the unexhausted claim is for "discrimination like or reasonably related to the allegations of the EEOC charge." *Ingels*, 42 F.3d at 625 (*quoting Brown v. Hartshorne Pub. Sch,. Dist. No. 1*, 864, F.2d 680, 682 (10th cir. [sic] 1988)). . . .

Petitioner's Petition p. 8a. (emphasis added).

The Tenth Circuit, relying heavily on *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794 (10th Cir. 1997), then went on to discuss the exception concerning retaliatory acts, including an analysis of other cases with similar facts.

In the underlying charge, Petitioner made absolutely no reference to the fact that he had previously filed Charge I, nor did he claim he had not been promoted because he had engaged in any protected activity. He listed the date of the occurrence giving rise to Charge II as beginning and ending on August 15, 1994, the date he was denied a promotion. He listed his race, black, as the reasons he believed he was being discriminated against. Absolutely nothing set forth in the original charge would suggest he was alleging retaliation. Accordingly, applying the reasoning in *Seymore*, the amendment was deemed to not relate back to the date of the original filing.

Petitioner has claimed this case turned on whether the proper legal theory was checked off in the boxes

denoting race, age, retaliation, etc. He claims "In this case, Mr. Simms' failure to check the "retaliation" box had the consequence, in the opinion of the court below, of completely cutting off his right to bring his retaliation claims before a court even though they were investigated and unsuccessfully conciliated by the EEOC." Petitioner's Petition pp. 17-18. Such statement is not accurate. It was not until it had addressed the actual facts of the case, including the factual description of the events contained in the original charge, that the Tenth Circuit affirmed the finding of the district court.

This is the typical manner employed by the Tenth Circuit in determining if amendments relate back to the date of the original filing. In *Jones v. Runyon*, 91 F.3d 1398 (10th Cir. 1996) the Tenth Circuit held:

> When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge. . . . *Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994) (quotations omitted). Therefore, we examine both [the plaintiff's] original charge to the EEOC and her federal court complaint to determine whether the issues she raised to the district court were both new and unrelated to her EEOC charges, thus defeating the court's jurisdiction over her action). *Id.* at 1400.

In reviewing the cases, discussion concerning whether the appropriate box denoting what legal theory was checked appears frequently, but comprises only one factor addressed. *See e.g. Cheek*, 31 F.3d 497 (7th Cir. 1994);

Ang, 932 F.2d 540 (6th Cir. 1991); *Hicks*, 672 F.2d 960 (3rd Cir. 1977); *Sanchez*, 431 F.2d 455 (5th Cir. 1970). In cases such as these, it is much more likely than not the plaintiff neglected to check the appropriate box, else the defendant-employer would not believe he had grounds to contest the amendment. That the Tenth Circuit addressed this issue before continuing to discuss whether the amendment set forth information that was reasonably related to the facts alleged in the original charge was certainly not error. Had the Tenth Circuit failed to continue the analysis of determining whether the amendment was reasonably related to the original charge, such omission might have been inappropriate, but this is not an issue in this case.

Although Petitioner has argued the Tenth Circuit adopted a hyper-technical rule that circumvents the purposes of Title VII, a review of the opinion indicates its decision to affirm the district court complies fully with 29 CFR § 1601.12(b) and properly balances the competing interests of plaintiffs, defendants and the EEOC.

CONCLUSION

For all the reasons contained herein, the Tenth Circuit properly affirmed the district court order. Further, there exists no split in the Circuits on the pertinent issues in this case to warrant acceptance of certiorari by this Court.

Respectfully submitted this 22 day of June, 1999.

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IN THE

Supreme Court of the United States

CEDRIC D. SIMMS,

Petitioner,

v.

STATE OF OKLAHOMA, EX REL.,
THE DEPARTMENT OF MENTAL HEALTH AND
SUBSTANCE ABUSE SERVICES, A STATE AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

In its quest to avoid review of the Tenth Circuit's erroneous opinion, the respondent has distorted the factual proceedings below and obscured the legal issues posed by this Petition. Petitioner, Cedric Simms, submits this reply brief to clarify the procedural history and legal questions squarely presented for review in this case.

I. THE RESPONDENT MAKES INCORRECT FACTUAL AND LEGAL ASSERTIONS

A. *The Statement of the Case*

In the body of its brief, respondent states that "[t]he Court should consider the amendment was not even filed until after Respondent filed a motion for partial summary judgment." [R. Br. at 22]. This statement creates the erroneous impression that Mr. Simms amended his second EEOC charge *after* filing an action in federal court based on that charge. Respondent has obscured the fact that the charge at issue here, Charge II, was still pending before the EEOC, without a right-to-sue letter having been issued, when Mr. Simms filed his amendment to that charge.

On October 31, 1994, Mr. Simms filed a charge with the EEOC based on the circumstances surrounding the denial of his promotion to Fire and Safety Officer Supervisor ("Charge II"). On June 5, 1995, while Charge II was still pending, Mr. Simms filed a third EEOC charge ("Charge III") alleging retaliation for filing Charge II. On November 29, 1995, the EEOC issued a right-to-sue letter for Charge III. On January 12, 1996, Mr. Simms filed an action in the Western District of Oklahoma ("*Simms II*") based on the allegations in *Charge III*. When *Simms II* was filed, EEOC Charge II was still pending before the EEOC, and the Commission was still investigating the allegations of race discrimination.

On July 15, 1996, while Charge II was still pending, Mr. Simms filed an amendment to Charge II. The EEOC accepted the amendment, investigated the amended charge, attempted conciliation, and ultimately issued a right-to-sue letter for Charge II. On September 25, 1996, Mr. Simms filed an action in federal district court ("*Simms III*") based on the amended allegations in Charge II. Charge II and *Simms III* are at issue in this Petition.

B. *The Applicable EEOC Regulation*

The respondent's arguments are predicated on an outdated version of the EEOC regulation at issue in this case. The respondent erroneously cites and relies on a version of 29 C.F.R. §1601.12(b), the regulation governing when amendments relate back to the date of an original charge, that has not appeared in the Code of Federal Regulations for 27 years. [R. Br. at 1-2, 10]. The version quoted by respondent appeared in the C.F.R. between 1967 and 1972, and appeared at §1601.11, *not* at §1601.12, the section to which respondent attributes it. This outdated language has since been amended twice, in 1972 and 1977, to allow a broader range of amendments to relate back to the date of an original charge. *See* 37 Fed. Reg. 9215 (May 6, 1972); and 42 Fed. Reg. 47833 (Sept. 22, 1977).

The outdated 1967 regulation that respondent quotes is misleading because it specifies only a limited number of purposes for which an EEOC charge may be amended: "to cure technical defects or omissions. . . or to clarify or amplify allegations made therein." 29 C.F.R. §1601.11(b) (1967).[1] The current regulation, by contrast, specifically

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[1]The 1967 regulation states:

> A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments related back to the original filing date.

adds that "amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received." 29 C.F.R. §1601.12(b) (1999).[2] This addition significantly broadens the range of amendments that can relate back to the original filing date and makes clear that amendments relating back to the date of the original charge need not be limited to "clarify[ing] or amplify[ing]" the allegations originally in the charge.

The version relied on by the respondent was amended expressly for the purpose of allowing amendments to EEOC charges like the one at issue in this case to relate back to the date of the original charge. In the edition of the Federal Register in which the 1967 regulation quoted by respondent was first amended, the EEOC included an explanatory preface making clear its intent to avoid limiting the protections under Title VII available to laypersons based upon a narrow interpretation of the grievances mentioned in

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> However, an amendment alleging additional acts constituting unlawful employment practices not directly related to or growing out of the subject matter of the original charge will be permitted only where at the date of the amendment the allegation could have been timely filed as a separate charge.

29 C.F.R. §1601.11(b)(1967).

[2]The current regulation states:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

29 C.F.R. 1601.12(b)(1999).

their original charges:

> . . . the nature of employment discrimination is complex, pervasive, and institutionalized, and. . . those filing charges may not fully comprehend the distinctions among its various forms. The Commission is under an obligation to safeguard the Federal rights of persons "* * * untutored in the technicalities of the law and who may or may not (at the time of filing the charge) be able to fully articulate their grievances or be aware of the full panoply of discriminatory practices against them or others similarly situated * * *"

37 Fed. Reg. 9215 (May 6, 1972), quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). Although this passage referred specifically to other provisions of the C.F.R. that were amended at the same time, the language illuminates the EEOC's reasons for changing the provision governing when amendments to EEOC charges can relate back to the date of the original charge.

In its preface to the amendments, the EEOC went on expressly to recognize that a charge alleging a particular violation or legal theory under Title VII could legitimately grow to encompass other violations or legal theories:

> There is a substantial possibility that a charge which initially alleges only limited violations of title VII "may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations* * *"

37 Fed. Reg. 9215 (May 6, 1972) quoting *King v. Georgia Power Company*, 295 F. Supp. 943, 947 (N.D. Ga. 1968). Thus, at the time it rejected the outdated version of the regulation cited by respondent, the EEOC recognized that a charge only alleging certain violations, could naturally grow to encompass "any kind of [related] discrimination."

The regulatory language which respondent misleadingly presents, and on which its arguments rely, does not reflect the recognition by the EEOC, better articulated in the current regulation, that the complexities of employment discrimination demand that charges not be restricted to the kinds or theories of discrimination originally alleged.

II. RESPONDENT ADVANCES ARGUMENTS THAT ARE IRRELEVANT TO THE QUESTION PRESENTED HERE AND THAT OBSCURE THE SPLIT IN THE CIRCUITS

The respondent devotes a substantial part of its opposition brief to attempting to explain away the clear split among the Courts of Appeals on the issue directly raised by this case: When does an amendment to a pending EEOC charge relate back to the date of the original charge? *Compare Simms v. Oklahoma*, 165 F.3d 1321, 1326-28 (10th Cir. 1999) (prohibiting amendments alleging new legal claims deriving from same set of operative facts included in the original charge); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996) (same); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988) (same); *Hopkins v. Digital Equip. Corp.*, 1998 WL 702339, *2 (S.D.N.Y. 1998) (same); *Lantz v. Hospital of the Univ. of Penn.*, 1996 WL 442795, *4 (E.D.Pa. 1996) (same); *with Zanders v. O'Gara-Hess*, 952 F.2d 404 (6th Cir. 1992), 1992 U.S.App. Lexis 535 (allowing amendments alleging new legal claims deriving from same operative facts included in the original charge); *Anderson v. Block*, 807 F.2d 145, 149 (8th Cir. 1986) (same); *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-1076 (8th Cir. 1982) (same); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 464 (5th Cir. 1970) (same). *See also, Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) (dicta).

Rather than challenge the existence of the circuit split, the respondent argues that Mr. Simms' reliance on this line of cases is misplaced. In a manner that can only confuse the issues, respondent argues that the central

question before the Court is whether the retaliatory conduct complained of occurred prior to or after the EEOC charge was filed. To support this argument the respondent relies on factually and legally distinguishable cases that address the distinct issue of whether a plaintiff may seek judicial relief in a federal court complaint for discriminatory or retaliatory incidents that have never been listed in an original or amended EEOC charge. This issue is irrelevant to the question before this Court: When may an amendment to a pending EEOC charge relate back to the date the charge was originally filed?

The cases relied upon by respondent focus on the separate question of when, under the "scope of the investigation" rule or the "reasonably related" rule[3] a court can hear a claim that was never made a part of an EEOC charge. For example, in *Steffen v. Meridian Life Insurance Co.*, 859 F.2d 534 (7th Cir. 1988), the Seventh Circuit addressed the question of whether a plaintiff's claim of retaliation that was not included in the EEOC charge was "like or reasonably related to the allegations of the charge" before the court so as to be cognizable in the federal action. *Steffen*, 859 F.2d at 544. The court did not address the issue of when an amendment to an EEOC charge alleging retaliation may relate back to the date of the original charge and distinguished the case before it from cases where "the

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[3]As discussed in Mr. Simms' Petition the "scope of the investigation" and the "like or reasonably related" doctrines are inquiries distinct from the question whether amendments relate back to the date of the original charge. These two doctrines

> revolve[] around the principle that the scope of a civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the [ ] investigation could reasonably be expected to uncover.

Conroy v. Boston Edison Co., 758 F. Supp. 54, 58 (D. Mass. 1991).

employer was given clear notice from the EEOC that retaliation was at issue." 859 F.2d at 545, n.2. *See also Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794 (10th Cir. 1997), *cert. denied,* 118 S.Ct. 342 (1997); *Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2nd Cir. 1993); *Ang v. Procter & Gamble Co.*, 932 F.2d 540 (6th Cir. 1991); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989).

In contrast, Mr. Simms filed an amendment to his EEOC charge pursuant to 29 C.F.R. § 1601.12(b) to include retaliation as a legal claim and to explain why he believed respondent's decision not to promote him was motivated by racial discrimination and retaliation for his previous lawsuit. This amendment was filed while the underlying EEOC charge was still pending before the administrative agency. The EEOC accepted Mr. Simms' amendment, investigated the amended charge, found cause to believe that the amended charge was true, and attempted conciliation. Accordingly, the issue before the district court was not whether Mr. Simms could include in his lawsuit claims not previously subject to an EEOC charge, because he had amended his EEOC charge to include the retaliation claims prior to filing his lawsuit.

The distinction between the question presented in *Steffen*, *Ang*, *Malarkey*, and *Seymore* and that at issue in the instant case is important. The policy considerations that motivated the decisions cited by the respondent are not relevant here. The respondent's attempt to conflate the two issues only serves to underscore the dangers of severely limiting a Title VII complainant's ability to amend a pending charge to include additional legal claims stemming from the same core of operative facts as in the original charge. When the case is viewed from the proper analytic framework, the respondent's "list of horribles" of what could result disappears. This is in stark contrast to the very real dangers of applying the technical rule advocated by the respondent

to a process usually initiated by uncounselled complainants.

First, the policy considerations supporting the opinions in *Seymore*, *Malarkey*, *Steffen*, and *Ang* are distinct from those here. In those cases, the courts were motivated by the desire to protect the purposes of the EEOC filing requirement by providing notice to respondents and providing the EEOC opportunity to investigate and attempt to conciliate the retaliation claim. *See Seymore*, 111 F.3d at 800; *Malarkey*, 983 F.2d at 1209; *Ang*, 932 F.2d at 546; *Steffen*, 859 F.2d at 545, n. 2. Here, all purposes of the EEOC filing requirement were fulfilled. The respondent was given notice of Mr. Simms' retaliation claims and the EEOC thoroughly investigated the charge as amended and provided the parties with an opportunity to conciliate all claims. The purpose of the statutory exhaustion requirement is not furthered by denying a complainant the opportunity to pursue such claims in federal court.

Respondent has disingenuously argued that "unless a plaintiff indicates in the *original charge* that he engaged in some protected conduct that led to the defendant's alleged retaliatory acts, there arises no reasonable inference that retaliation has taken place" and respondent is, thereby, denied notice of the retaliation charge. [R. Br. at 12]. The respondent further states that:

> . . . a reasonable investigation of Petitioner's original charge would have looked to see if he had been denied a promotion because of his race. Nothing in the original charge would have alerted a reasonable investigator to go back in time to determine whether there had been previous EEOC filings that could possibly reveal a retaliatory motive for the failure to promote.

[R. Br. at 21]. This claim makes no sense. Even if the complainant did not mention the retaliation charge in the original charge, the standard EEOC investigation of an

employee's discrimination charge would likely reveal previous charges by the same employee against the same employer. *See EEOC Compliance Manual* §§602.6(a)(1) and (c) (1999 Commerce Clearing House Inc.).

The EEOC's formal investigation procedures begins with an inquiry into the history of the employee's relationship with the employer:

> The charging party/complainant provides all of the initial information concerning the basis and issue of the charge/complaint . . . . Background information includes, but is not limited to, a brief summary of the charging party/complainants's work history with the respondent . . . and any other information which charging party/complainant feels is relevant to the charge/complaint.

EEOC Compliance Manual §602.6(a)(1). A prior EEOC charge is likely to be a salient feature of any such history and is, therefore, likely to be among the first pieces of information gathered by the investigator.

Here, in addition to notification through the EEOC process, the respondent was undoubtedly aware of Mr. Simms' prior EEOC charge and Title VII action and that it might be at issue because its managers, Kellison and LaBoon, received a copy of the settlement order in *Simms I* and the instant charge was filed only six months after the parties reached a settlement in *Simms I*.

To adopt the *per se* rule urged by the respondent, restricting pre-filing retaliation charges but not post-filing retaliation charges, would result in the type of technical stringency this Court warned against in *Love v. Pullman*, 404 U.S. 522 (1972) and *Zipes v. Trans World Airlines, Inc. Independent Federation of Flight Attendants*, 455 U.S. 385 (1982). It neither promotes Title VII nor respects the realities of the administrative process often initiated by laypersons.

Finally, the respondent has misstated the thrust and effect of the Tenth Circuit's opinion in this case. Respondent argues that the decision rested on its determination that under *Seymore v. Shawver & Sons*, Mr. Simms' retaliation claims were not "reasonably related" to the federal complaint. [R. Br. at 26]. The respondent has lumped together two distinct lines of inquiry performed by the court of appeals in an attempt to obscure the needlessly stringent and technical rule employed by the court.

As discussed above, *Seymore* and similar cases cited by the respondent examine when a claim not included in *any* EEOC charge may still be included in a federal action. Thus, in applying the reasoning in *Seymore* to the present case the Tenth Circuit was determining under the "reasonably related rule" whether the retaliation claim could be so included. But what the respondent has ignored is that the foundation for the Tenth Circuit's "reasonably related" analysis is its determination that Mr. Simms' retaliation amendment did not relate back to the date of the original charge under §1601.12(b). To reach that conclusion the court employed the rule that amendments to an EEOC charge alleging new legal claims, even those stemming from the same core of operative facts as in the original charge, cannot relate back to the date of the original charge. This is a hyper-technical approach, divorced from the realities of the EEOC administrative process and the facts of this case.

Further belying the respondent's claim that Mr. Simms has imported a circuit split from an unrelated line of cases and misrepresented the Tenth Circuit's opinion is that court's own acknowledgement of a split in the circuits on the issue of when an amendment stating new legal claims relates back to the date of the original charge. (Pet. App. 7a-8a.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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